BLANK PAGE

Office... Supreme Court, U. S.
FILED
OCT 4 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1946~~.

No. ~~12~~ 6, Original.

39

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Appendices A to I to Brief for the State of California in Opposition to Motion for Judgment.

FRED N. HOWSER,
Attorney General of California,
WILLIAM W. CLARY,
Assistant Attorney General,
C. ROY SMITH,
Assistant Attorney General,
State Capitol, Sacramento, Calif.,
Counsel.

CUMMINGS & STANLEY,
HOMER CUMMINGS,
MAX O'RELL TRUITT.

O'MELVENY & MYERS,
LOUIS W. MYERS,
JACKSON W. CHANCE,
SIDNEY H. WALL,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

BLANK PAGE

TOPICAL INDEX.

PAGE

Appendix A 1

There is no case or controversy under article III, section 2 of the Constitutions 1

A. There is no controversy in a legal sense, but only a difference of opinion between federal and state officials 2

B. It is impossible to identify the subject matter of the action 10

(a) Plaintiff has failed to identify the lands claimed 12

(b) It would be impossible to render a decree in this case which could be made to apply to any particular land 14

(i) When does a bay become a "true bay"? 20

(ii) What constitutes a port? 22

(iii) When does a bay become open sea? 23

(iv) What law governs? 27

Appendix B 33

The Attorney General is not authorized to bring or maintain this proceeding 33

Appendix C 39

English court decisions and treatises 39

1. The Crown's title to the bed of the sea for some distance below low-water mark was established by the English common law authorities prior to 1776 39

2. The English common law authorities after 1776 confirm the Crown's title to the bed of the marginal sea 50

(a) The cases 51

(b) Treatises 61

(c) The dicta in the Queen v. Keyn 65

(d) Summary 74

Appendix D. United States v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936) 75

PAGE

Appendix E 79

I.

Crown charter grants to American colonies in 16th and 17th centuries conveyed "adjoining seas" along the Atlantic coast 79

II.

Original states both in colonial times and since statehood have always maintained their ownership of the marginal seas 86

(a) Massachusetts 86

(i) Colonial charters 86

(ii) Colonial legislation 86

(iii) County and town coastal boundaries 87

(iv) Three-mile boundary statute 88

(v) Fishery statutes 90

(b) Rhode Island 91

(i) Colonial charter and patent 91

(ii) Colonial statutes 92

(iii) Fishery statutes 92

(iv) Three-mile boundary statute 93

(v) Grants to United States 93

(c) New Hampshire 94

(i) Colonial charters 94

(ii) State Constitution 94

(iii) Colonial legislation 94

(iv) Three-mile boundary statute 95

(v) Leasing of beds of coastal waters 96

(d) New York 96

(i) Charter and Constitution 97

(ii) Colonial legislation 98

PAGE

(iii) County boundaries 99
(iv) Court declarations 99
(v) New York-New Jersey boundary 100
(vi) Three-mile statute 100
(vii) State ownership of fish 101

(e) New Jersey 101
(i) Colonial charter 101
(ii) Colonial legislation 102
(iii) Early declarations of three-mile belt 102
(iv) State coastal boundary statute 103

(f) Delaware 104
(i) Colonial charter 104
(ii) Three-mile statute 105
(iii) Court decree 105

(g) Maryland 106
(i) Charter and Constitution 106
(ii) Three-mile statute 107

(h) Virginia 108
(i) Colonial charters 108
(ii) Constitution and statutes 108
(iii) Three-mile statute 109

(i) North Carolina 109
(i) Constitution 110
(ii) Three-mile statute 111

(j) South Carolina 111
(i) Boundary statutes 111
(ii) Three-mile statute 112
(iii) Grants to United States 113

PAGE

(k) Georgia 113

(i) Charter 113

(ii) Boundaries 114

(iii) Three-mile statutes 115

Appendix F 117

Prescription 117

(Third affirmative defense) 117

I.

Facts establishing California's prescriptive title 117

1. Declarations of state's ownership 117

2. Acts of occupation, possession and use 121

(a) Grants by state to coastal municipalities of large portions of three-mile belt 121

(b) Construction of piers, wharves, and breakwaters 121

(c) Construction of groins, jetties and sea-walls 123

(d) Oil and gas leases of submerged lands 124

(e) Assessment and collection of taxes on submerged lands 131

(f) Fishing industry 131

(g) Leasing of kelp beds 137

(h) State and county boundaries cover entire 3-mile belt—exercise of state's jurisdiction and sovereignty 141

3. Expenditures of capital and labor by state and its grantees, lessees, licensees 142

II.

Cases cited by counsel for plaintiff are not in point 143

PAGE

Appendix G 149

Acquiescence 149

(Second affirmative defense) 149

(I)

Policy of Congress 149

(II)

Grants of submerged lands to the United States from the state of California 169

1. 1897 California statute granting submerged lands in open sea 174

(a) Plaintiff concedes at least 3 of 17 grants under Act of March 9, 1897, were submerged lands under marginal sea 176

(b) Illustrated by San Diego Military Reservation submerged land grant 177

(c) Illustrated by Zuninga Shoal Tract submerged land grant 178

(d) Illustrated by Lime Point submerged land grant 179

(e) Illustrated by Presidio Military Reservation submerged land grant 180

(f) Illustrated by Deadman's Island submerged land grant 182

(g) Illustrated by Ft. McArthur Military Reservation submerged land grant 184

(h) The remaining eleven submerged land grants under 1897 Act 185

(i) Congress itself specifically recognized the grants to the United States under the 1897 Act 186

PAGE

(j) The United States Attorney General has rendered opinions declaring validity of grants to United States under 1897 Act.....187

(k) Secretary of War and various officers in War Department have uniformly asserted validity of grants to United States under 1897 Act.....189

(l) Comments of counsel for plaintiff on 1897 California statute granting submerged lands in open sea 190

2. North Island grant of submerged lands in marginal sea 194

3. Coronado Beach Military Reservation submerged land grant 201

4. Catalina Island Pebbly Beach easement.....203

5. Catalina Island Rock Loading Plant easement.....206

6. Saltwater pipe line easement in Pacific Ocean and Bay of Santa Monica.....207

7. Numerous other grants of submerged lands from California to the United States.....211

(III)

Grants from California municipalities to United States.....212

1. City of Newport Beach grant of approximately 11 acres in marginal sea.....213

2. Newport Beach dredge deposit easement.....218

3. City of Long Beach grants to the United States of submerged lands in the Pacific Ocean and Bay of San Pedro 220

(a) Long Beach oceanward boundary.....220

(b) Submerged land grant from the state to city....221

(c) Outer Harbor of Long Beach.....221

PAGE

(d) Victory Pier lease to the United States.....223

(e) Four additional leases or permits from City of Long Beach 225

(f) Long Beach offshore petroleum development—with full knowledge of Congress.....226

(g) Comments of counsel for plaintiff on City of Long Beach submerged land grants.....227

4. City of Los Angeles grants to the United States of submerged lands in the Pacific Ocean and Bay of San Pedro 230

(a) Los Angeles oceanward boundary.....230

(b) Legislative grant of submerged lands to the City of Los Angeles.....231

(c) Outer Harbor of Los Angeles.....231

(d) 1903 easement to War Department.....232

(e) Four leases of Municipal Pier No. 1.....233

(f) Outer Harbor Dock and Wharf Company lease to the United States.....234

(g) 9.75-acre grant to the United States.....235

(h) 61.98-acre exchange 238

(i) Submarine base site.....240

(j) Two "Area D" permits.....243

(k) Reeves Field leases.....244

(l) Navy landing permit—former submarine base site 246

(m) Other submerged land grants and leases from the City of Los Angeles to the United States..247

5. City of Santa Barbara grants and leases to the United States of submerged lands in the Pacific Ocean and Santa Barbara Channel.....248

PAGE

(a) Oceanward boundary of Santa Barbara.....248

(b) Grant of tide and submerged lands from state to city 248

(c) Construction of breakwater.....249

(d) Four grants and leases to the United States....249

6. Grants from the Cities of San Diego, Oakland and San Francisco 253

(IV)

Grants from other coastal states to the United States.....254

1. Grant of State of Washington to United States in marginal sea 254

2. Grants from Texas to the United States.....257

(a) Grant of Galveston South Jetty area.....257

(b) Mustang Island grant.....258

3. Mississippi grant to the United States of submerged lands surrounding Ship Island in the Gulf of Mexico 260

4. Grants from Florida to the United States.....265

(a) St. John's River Jetty, extending about two miles into the Atlantic Ocean.....265

(b) Crystal River spoil area permit.....271

5. Grants from South Carolina to the United States....272

(a) Outside entrance to Winyah Bay.....272

(b) Grant of submerged lands around Fort Moultrie Military Reservation.....273

(c) Grant of submerged lands in front of the town of Moultrieville 274

(d) Second grant of submerged lands adjoining Fort Moultrie Military Reservation.....275

PAGE

(e) Third grant of submerged lands in marginal sea adjoining Fort Moultrie Military Reservation 276

6. Delaware grants of submerged lands to the United States 276

7. Grants from Rhode Island to the United States of submerged lands in the marginal sea 277

(a) Grant at the mouth of Seaconnet River 277

(b) Grants around Block Island 278

8. Grant by Massachusetts of Minot's Rock 279

9. Numerous other grants from coastal states to the United States 280

(V)

Judicial, congressional and departmental rulings and acts recognizing states' ownership of submerged lands 281

(A) By the judiciary 281

(B) By the legislative branch 282

(C) By United States Attorney General 283

(D) By the Secretary and Department of the Interior 285

(E) By the War and Navy Department 297

Appendix H 303

Estoppel—laches—res judicata 303

I.

Estoppel 303

1. Estoppel runs against the United States in favor of a state 304

2. Counsel's argument that the representations were unauthorized is unsound 306

PAGE

3. Counsel's argument that there has been no reliance by the state is groundless.....310

II.

Laches 312

III.

Res judicata 315

Appendix I 317

Department of Commerce U. S. Coast and Geodetic Survey....317

TABLE OF AUTHORITIES CITED

CASES — PAGE

Abby Dodge, The 223 U. S. 166 ..... 133, 158, 159, 160, 265

Aetna Life Ins. Co. v. Haworth, 300 U. S. 277 ..... 9, 11, 14

Alaska Gold Mining Co. v. Barbridge, 1 Alaska 311 151

Alaska Gold Recovery Company v. Northern Mining and Trading Company, 7 Alaska Reports 386 287

Anna, The, 5 C. Rob. 373, 165 Eng. Rep. 809 (1805) 51

Arizona v. California, 283 U. S. 423 9

Arkansas v. Tennessee, 310 U. S. 563 146

Ashwander v. T. V. A., 297 U. S. 288 308

Attorney General v. Chambers, 4 De G. M. & G., 206, 43 Eng. Rep. 486 (1854) 56, 57, 61

Attorney General v. Emerson, L. R. [1891], A. C. 649 61

Attorney General v. Hanmer, 4 Jur. N. S. 751 (1858) 56

Attorney General v. Johnson, 2 Wilson Ch. 87, 37 Eng. Rep. 240 (1819) 61

Attorney General v. Parmeter, 10 Price 378, 147 Eng. Rep. 345 (1811) 61

Attorney General v. Richards, 2 Anst. 603, 145 Eng. Rep. 980 (1794) 61

Attorney General for British Columbia v. Attorney General for Canada [1914], A. C. 153 ..... 29, 71

Ayer & Lord Co. v. Kentucky, 202 U. S. 409 22

Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 ..... 132, 137

Bayside Fish Flour Co. v. Zellerbach, 124 Cal. App. 564 ..... 132, 137

Benest v. Pipon, 1 Knapp 60, 12 Eng. Rep. 243 55

Blundell v. Catterall (1821), 5 B. & Ald. 268, 106 Eng. Rep. 1190 ..... 53, 61

Boone v. Kingsbury, 206 Cal. 148; cert. den. 280 U. S. 517 ..... 118, 120, 126, 281, 310

Brant v. Virginia Coal & Iron Co., 93 U. S. 326 308

PAGE

Borax Consolidated v. Los Angeles, 296 U. S. 10.....150, 291

Bulstrode v. Hall & Stephens, 1 Sid. 148, 82 Eng. Rep. 1024 (1647) 47

Burgess v. Gray, 16 How. 48.....144

Carpenter v. City of Santa Monica, 63 Cal. App. (2d) 772.....252

Carter v. Murcot, 4 Burr. 2162, 98 Eng. Rep. 127 (1768).....49, 54

Case of The Royal Fishery of the River Banne, Dav. 55, 80 Eng. Rep. 540..... 41

Chisholm v. Georgia, 2 Dall. 463..... 77

City of Hoboken v. Pennsylvania Railroad Company, 124 U. S. 656 103

City of Los Angeles v. Anderson, 206 Cal. 662.....252

Cohens v. Virginia, 6 Wheat. 264..... 28

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Case No. 3230.....160

County of St. Clair v. Lovingston, 23 Wall. 46.....252

Cramer v. United States, 261 U. S. 219.....307

Cunningham, Joseph, 55 I. D.....297

Dana v. Jackson Street Wharf Company, 31 Cal. 118.....252

Darbee Oyster and Land Co. v. Pacific Oyster Co., 150 Cal. 392 133

Davis v. Corona Coal, 265 U. S. 219.....145

DeLongumere v. N. Y. Fire Ins. Co., 10 Johns 120..... 22

De Lovio v. Boit, 7 Fed. Cas. 418, Case No. 3776..... 67

Devato v. 823 Barrels of Plumbago, 20 Fed. 510..... 22

Douglas Aircraft Company v. Byram, 57 Cal. App. 311, 134 Pac. (2d) 15 210

Dunham v. Lamphere, 3 Gray 268.....133, 160

Dunn v. Ickes, 115 F. (2d) 36.....292, 297

Free Fishers and Dredgers of Whitstable, The, v. Gann, 20 C. B. (N. S.) 1, 144 Eng. Rep. 1003 (1865)..... 58

PAGE

Gammell v. Her Majesty's Commissioners of Woods and Forests, 3 Macqueen's Appeals 419 (1859) 57

Gibson v. Chouteau, 13 Wall. 92 144

Guaranty Trust Company v. United States, 304 U. S. 126 ..... 145, 146, 306, 312

Hardin v. Jordan, 140 U. S. 371 289

Hartwell Lumber Co. v. United States, 128 Fed. 306 (C. C. N. D. Ill., 1904) 22

Hays v. United States, 175 U. S. 248 144

Heine v. Roth, 2 Alaska 418 ..... 33, 151

Illinois Central Railroad v. Illinois, 146 U. S. 387 150

Ipswich Dock Commissioners v. Overseers of the Parish of St. Peter, Ipswich, 7 B. & S. 310 (1866) 58

James W. Logan, 29 L. D. 395 286

Jeems Bayou Club v. United States, 260 U. S. 561 307

Johnson v. Barret, Aleyn 10, 82 Eng. Rep. 887 ..... 44, 45

Jones v. United States, 96 U. S. 24 308

Jordan v. Barrett, 4 How. 168 144

Kern River Company v. United States, 257 U. S. 147 35

Kelly v. Kingsbury, 210 Cal. 37 118

Ketchum v. Duncan, 96 U. S. 659 308

Lee Wilson & Co. v. United States, 245 U. S. 24 307

Logan, Re, 29 L. D. 395 ..... 150, 151

Los Angeles Athletic Club v. City of Santa Monica, 63 Cal. App. (2d) 795 252

Light v. United States, 220 U. S. 523 164

Lord Advocate v. Trustees of the Clyde Navigation, 19 Rettie 174 (1891) 59, 72

Lord Advocate v. Weymss, 1900 A. C. 48 (1899) 60, 73

Lord Fitzhardinge v. Purcell (1908), 2 Ch. 139 ..... 60, 72

Louisiana v. Mississippi, 202 U. S. 1 260

PAGE

Mahler v. The Norwich and New York Transportation Co., 35 N. Y. 352 99
Manchester v. Massachusetts, 139 U. S. 234 ..... 69, 73, 133, 160
Mann v. Tacoma Land Co., 153 U. S. 273 ..... 33, 150, 152
Marincovich, In re, 48 Cal. App. 474 ..... 132, 136
Marshall v. City of Long Beach, 11 Cal. (2d) 609, 82 P. (2d) 362 221
McCready v. Virginia, 94 U. S. 391 ..... 133, 160
Mirkovich v. Milnor, 34 Fed. Supp. 409 ..... 132, 137
Morris v. United States, 174 U. S. 196 150
Morrow v. Whitney, 95 U. S. 551 144
Murphy v. Ryan, Ir. R. 2 C. L. 143 (1868) 59
Muskrat v. United States, 219 U. S. 346 ..... 10, 14
New Jersey v. Delaware, 294 U. S. 361 106
New Jersey v. Sargent, 269 U. S. 328 14
No. 34 Case, The, 11 F. (2d) 287, later opinion 13 F. (2d) (2d) 927 314
Northern Pacific R. R. Co. v. McComas, 250 U. S. 387 145
Oaksmith's Lessee v. Johnston, 92 U. S. 343 143
Ocean Industries, Inc. v. Greene, 15 F. (2d) 862 ..... 132, 137
Ocean Industries, Inc. v. Superior Court, 200 Cal. 235 ..... 18, 137
Oklahoma v. Texas, 268 U. S. 252 308
Osborne v. United States Bank, 9 Wheat 737 27
Paladini v. Superior Court, 178 Cal. 369 ..... 132, 136
Patton v. City of Los Angeles, 169 Cal. 521 252
Penhallow v. Doane, 3 Dall. 54 77
People v. Monterey Fish Products Co., 195 Cal. 548 ..... 132, 137
People v. Reilly, 14 N. Y. S. (2d) 589 99
People v. Stafford Packing Company, 193 Cal. 719 ..... 132, 137
People v. Stralla, 14 Cal. 617 228
People v. Truckee Lumber Co., 116 Cal. 397 132

PAGE

People ex rel. Mexican Telegraph Co. v. State Tax Commission, 220 N. Y. S. 8 99

Petrel Guano Co. v. Jarnette, 25 Fed. 675 22

Pine River Lodging Co. v. United States, 186 U. S. 279 307

Pollard v. Hagan, 3 How. 212 20

Port of Seattle v. Oregon and Washington Railroad Company, 255 U. S. 56 152

Queen, The, v. Keyn, L. R. 2 Exch. Div. 63 at 155-158 (1876) 57, 65, 66, 68, 69, 70, 72, 73

Queen, The, v. Musson, 8 El. & Bl. 899, 120 Eng. Rep. 366 (1858) 61

Reynolds, C. B. Jr., 56 I. D. 60 297

Rex v. Lord Yarborough, 3 B. & C. 91, 5 Bing 163, 1 Eng. Rul. Cas. 458 (1828) 54

Rhode Island v. Massachusetts, 4 How. 91 146

Royal Indemnity Co. v. United States, 313 U. S. 289 307

San Pedro, Los Angeles and Salt Lake Railroad Company v. Hamilton, 161 Cal. 610 118

Sanitary District of Chicago v. United States, 266 U. S. 405 148

Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. (2d) 56 ..... 132, 137

Scharf, Margaret, 57 I. D. 348 297

Scott v. Carew, 196 U. S. 100 150

Secretary of State for India v. Chelikani Rama Rao, 43 L. R. Ind. App. 192 (1916) 51, 53, 60, 66, 71, 73

Shively v. Bowlby, 152 U. S. 1 ..... 20, 33, 45, 47, 50, 66, 285

Shooters Island S. Co. v. Standard Shipbuilding Corporation, 293 Fed. 706 315

Sioux Tribe v. United States, 316 U. S. 317 308

Smith v. Earl of Stair, 6 Bell App. Cas. 487 (House of Lords, 1849) 61

Smith v. Maryland, 18 Howard 71 ..... 133, 160

Sparks v. Pierce, 115 U. S. 408 144

PAGE

Standard Oil Company of California v. United States, 107 F. (2d) 402 305

State of Iowa v. Carr, 191 Fed. 257 305

Stevens v. Patterson & Newark Railroad Company, 34 N. J. Laws (5 Vroom.) 532 102

Summers, In re, 325 U. S. 561 14

Suttori v. Peckham, 48 Cal. App. 288 ..... 132, 136

Twee Gebroeders, The, 3 C. Rob. 162, 165 Eng. Rep. 422 (1800) 51

United States v. Ashton, 170 Fed. 509 151

United States v. Beebee, 17 Fed. 36 315

United States v. Beebee, 127 U. S. 338 315

United States v. Carillo, 13 F. Supp. 121 ..... 27, 228

United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, affd. 209 U. S. 447 305

United States v. Curtiss-Wright Export Corporation, 299 U. S. 304 ..... 75, 77, 78

United States v. Denver & R. G. W. R. Co., 16 F. (2d) 374 305

United States v. Fitzgerald, 15 Peters 407 307

United States v. Grimaud, 220 U. S. 506 164

United States v. Holt State Bank, 270 U. S. 49 ..... 33, 150

United States v. Insley, 130 U. S. 263 312

United States v. Kirkpatrick, 9 Wheat. 720 312

United States v. Knight, 14 Pet. 301 145

United States v. McElroy, 25 Fed. 804 314

United States v. Michigan, 190 U. S. 379 313

United States v. Mission Rock Company, 189 U. S. 391 316

United States v. Nashville, etc., R. R. Co., 118 U. S. 120 145

United States v. Newark Meadows Improvement Company, 173 Fed. 426 ..... 19, 103, 104

United States v. Pan-American Petroleum Company, 55 F. (2d) 753, cert. den. 287 U. S. 612 35

PAGE

United States v. Pennsylvania and Lake Erie Dock Co., 272 Fed. 839 305

United States v. San Francisco, 310 U. S. 16 ..... 296, 307

United States v. San Jacinto Tin Co., 125 U. S. 273 ..... 35, 38

United States v. Schwalby, 147 U. S. 508 145

United States v. Standard Oil Co. of California, 20 F. Supp. 427, affd. 107 F. (2d) 402, cert. den. 309 U. S. 673 307

United States v. Stinson, 197 U. S. 200 ..... 305, 315

United States v. Summerlin, 310 U. S. 414 ..... 145, 312

United States v. Stinson, 125 Fed. 907 315

United States v. Texas, 143 U. S. 621 147

United States v. Texas, 162 U. S. 1 147

United States v. Thompson, 98 U. S. 486 145

United States v. United States F. & G. Co., 106 F. (2d) 804 (reversed on other grounds 309 U. S. 506) 35

United States v. Utah, 283 U. S. 64 (1931) 3, 13

United States v. Wallamet, etc., Co., 44 Fed. 234 314

United States v. West Virginia, 295 U. S. 463 ..... 6, 7, 10

United States ex rel. Roughton, 101 F. (2d) 248 297

Utah v. United States, 284 U. S. 534 307

Utah Power & Light Co. v. United States, 230 Fed. 328 305

Utah Power & Light Company v. United States, 243 U. S. 389 ..... 296, 307, 308, 312

Van Camp Sea Food Company v. Dept. of Natural Resources, 30 F. (2d) 111 132

Warren v. Matthews, 6 Mod. 73, 87 Eng. Rep. 831 (1704) 48

Weber v. Harbor Commissioners, 18 Wall. 57 295

Whiteside v. United States, 93 U. S. 247 308

Wilber National Bank v. United States, 294 U. S. 120 308

Willing v. Chicago Auditorium, 277 U. S. 274 5

CONSTITUTIONS AND STATUTES — PAGE

Act of June 1, 1687 (1 New Hampshire Province Laws, pp. 207, 251) 95
Act of June 16, 1791 (1791 Laws of New Hampshire, Chap. 14; Gen. Stats. 1867, Chap. 19, Sec. 2, p. 69) 95
Act of April 28, 1851 (Cal. Stats. 1851, p. 432) 133
Act of April 2, 1866 (Cal. Stats. 1866, p. 848) 133
Act of March 30, 1874 (Cal. Stats. 1873-74, p. 940) 133
Act of March 4, 1911 (36 Stats. 1235, 1236) 154
Act of March 4, 1913 (37 Stats. 828, 845; 38 Stats. 432, 442; 38 Stats. 1103) 154
Act of June 30, 1913 (37 Stats. 269, 290) 154
Act of Aug. 15, 1914, Sec. 1 159
Act of Aug. 15, 1914, Sec. 2 159
Act of June 3, 1916 (39 Stats. 215, Sec. 124, 39 Stats. 464, 465, 1153) 154
Act of Congress of September 11, 1851 (5 Stats. 468) 283
Act of Congress of February 22, 1889 (25 Stats. 676) 151
Act of Congress of May 14, 1898 (30 Stats. 409) 149
Articles of Confederation, Art. III 75
California Civil Code, Sec. 670 117
California Civil Code, Sec. 1113 190
California Constitution, Art. I, Sec. 25 134
California Constitution, Art. IV, Sec. 25½ 134
California Constitution, Art. XII, Sec. 1, 1849 141
California Constitution (1879) Art. XV, Sec. 3 118
California Fish and Game Code, Secs. 61-118.5 135
California Fish and Game Code, Secs. 580-589 ..... 137, 154
California Fish and Game Code, Secs. 590-594 154
California Fish and Game Code, Sec. 1010 137
California Fish and Game Code, Sec. 1060 137
California Fish and Game Code, Sec. 1064 137

PAGE

California Statutes of 1854, p. 153.....121
California Statutes of 1855, pp. 277, 291.....121
California Statutes of 1858, p. 120.....122
California Statutes of 1875-76, p. 115.....134
California Statutes of 1897, p. 51.....192
California Statutes of 1897, p. 74.....175
California Statutes of 1911, p. 1256.....231
California Statutes of 1911, pp. 1256, 1304.....119
California Statutes of 1911, p. 1304.....221
California Statutes of 1911, p. 1357.....118
California Statutes of 1913, p. 470.....212
California Statutes of 1913, p. 947.....122
California Statutes of 1915, p. 62.....119
California Statutes of 1915, p. 589.....135
California Statutes of 1915, p. 593, Chap. 379, Sec. 20.....135
California Statutes of 1917, p. 18.....118
California Statutes of 1917, p. 90.....119
California Statutes of 1917, p. 159.....231
California Statutes of 1917, p. 646.....137, 154
California Statutes of 1917, pp. 1047-1061.....135
California Statutes of 1917, p. 1061, Chap. 643, Sec. 48.....135
California Statutes of 1917, p. 1069, Chap. 643, Secs. 46, 55.....135
California Statutes of 1919, p. 1204.....137
California Statutes of 1917, p. 1673.....136
California Statutes of 1919, pp. 422-423.....136
California Statutes of 1919, p. 428.....135
California Statutes of 1919, pp. 941, 1011.....119
California Statutes of 1921, pp. 195, 272.....135
California Statutes of 1921, Chap. 303, p. 404.....124, 156
California Statutes of 1921, p. 459.....137

PAGE

California Statutes of 1921, p. 470 154
California Statutes of 1923, p. 593 ..... 125, 156
California Statutes of 1925, p. 181 ..... 119, 142
California Statutes of 1925, p. 235 221
California Statutes of 1925, p. 793 135
California Statutes of 1925, p. 944 156
California Statutes of 1929, p. 11 ..... 127, 156
California Statutes of 1929, pp. 11, 117, 254 119
California Statutes of 1929, p. 901 137
California Statutes of 1929, p. 944 120
California Statutes of 1929, p. 1085 231
California Statutes of 1929, p. 1182 135
California Statutes of 1929, p. 1691 212
California Statutes of 1931, p. 86 156
California Statutes of 1931, p. 846 127
California Statutes of 1931, p. 925 123
California Statutes of 1933, p. 394 137
California Statutes of 1933, p. 484 137
California Statutes of 1933, Chap. 773 135
California Statutes of 1933, p. 1523 ..... 127, 156
California Statutes of 1935, p. 793 221
California Statutes of 1937, p. 73 142
California Stautes of 1938, Extra. Sess., Chap. 5, p. 23 ..... 128, 156
California Statutes of 1941, p. 390 250
California Statutes of 1941, p. 880 123
California Statutes of 1941, p. 1902 156
California Statutes of 1941, p. 3090 202
California Statutes of 1943, p. 1294 119
Code of Virginia (1849), Title 1, Chap. 1, Sec. 1, pp. 48, 49 108
Declaratory Judgment Statute of 1934 (48 Stat. 955) 9

PAGE

Delaware Laws of 1931, p. 761 105
Fish and Game Code, Sec. 87 135
Fish and Game Code, Sec. 90 135
General Laws of Rhode Island, 1909, Title I, Chap. 1, Sec. 1 93
General Laws of Rhode Island (1938), Title XXIV, Sec. 12, p. 242 92
General Statutes 1860, Chap. 1, Sec. 1 89
General Statutes of Rhode Island, 1872, Title I, Chap. 1, Sec. 1 .. 93
Georgia Act No. 410 (1916),; Amended Code (1916), Sec. 16 ... 114
Georgia Laws (1924) p. 116 115
Georgia Political Code, Sec. 17 114
Harbor and Navigation Code, Sec. 4000 122
House Document No. 552, 75th Cong., 3rd Sess., pp. 3, 7, 8, 18, 19 249
House Document No. 1390, 62nd Cong., 3rd Sess., p. 6 257
Laws of Maryland (1831), Chap. 249, Sec. 1 107
2 Laws of New Hampshire Province, 1702-1745 (Concord 1913), pp. 790-794 96
1917 Laws of Oregon, Chap. 276, p. 516 ..... 154, 155
1920 Laws of Oregon, Title 32, Chap. 10, Sec. 5659, Vol. II, p. 2302 ..... 154, 155
Laws of the Commonwealth of March 1822, Chap. 97, p. 712, passed Feb. 22, 1822 90
Maine Pub. Laws of 1945, Chap. 248 155
Maine Revised Statutes 1916, Chap. 133, Sec. 3, p. 1514 88
Maine Revised Statutes 1930, Chap. 143, Sec. 3, p. 1640 88
Maryland Constitution, 1776, Art. III 106
Maryland Senate Bill No. 538, approved April 23, 1945 107
Massachusetts Acts and Laws of 1760, Chap. II, pp. 523-526 87
Massachusetts Acts 1859, Chap. 289 89
Massachusetts Acts 1881, Chap. 196, p. 518 89

PAGE

Massachusetts General Laws 1921, Chap. 42, Sec. 1 89

Massachusetts Laws 1789, p. 27 88

Massachusetts Laws of 1812, Chap. 27 (Laws of Massachusetts, Vol. VI, 1812-1815, p. 39) approved June 22, 1812 90

Massachusetts Province Laws 1692-3, Chap. 32 (Act of Nov. 26, 1692, Secs. 1, 2) 87

Massachusetts Province Laws 1702, Chap. 12 (Act of Nov. 21, 1702) 87

Massachusetts Public Statutes 1882, Chap. 27, Sec. 2 89

Massachusetts Revised Laws 1902, Chap. 25, Sec. 1 89

New Hampshire Constitution, 1792, Art. VII 94

New Hampshire Constitution, 1902, Art. VII 94

New Hampshire Laws, 1901, Chap. 115, p. 620 95

New Hampshire Laws 1941, Chap. 221 96

2 New Hampshire Province Laws, pp. 389-526 95

3 New Hampshire Province Laws, pp. 336, 524-526 95

New Jersey Laws 1703-1799, p. 262 102

New Jersey Laws of 1896, Chap. 103, Sec. 1, p. 151 103

New Jersey Laws, 1906, Chap. 260, p. 542 103

New Jersey Laws, 1919, Chap. 94, Sec. 1, p. 214 103

New Jersey Province Act of 1719 (Nevill), pp. 86-88 102

23 New Jersey Statutes Annotated (1940), Sec. 41, p. 29 103

23 New Jersey Statutes Annotated (1940), Sec. 46, p. 31 103

New York Laws of 1779, Chap. 25, Sec. XIII (1 Laws of New York, 1777-1784, pp. 173, 178) 97

New York Laws, 1813, Vol. II, p. 31 99

New York Laws, 1834, p. 9 100

New York Laws of 1912, Chap. 318, Sec. 175 101

New York Laws, 1912, Chap. 318, Sec. 300 100

New York Laws, 1925, Chap. 350, Sec. 1 100

PAGE

North Carolina Constitution (1776), Art. XXV 110
North Carolina General Statutes, Secs. 113-242 111
North Carolina Public Laws (1911), p. 268 111
North Carolina Public Laws (1931) p. 35 111
Penal Code, Secs. 599, 634-635 134
Penal Code, Sec. 636 136
Plymouth Colony Laws, Part I, pp. 96-97 86
Plymouth Colony Laws (Brigham), Part II, pp. 205, 282, 283-4 (Rev. Laws 1671, Chap. X, Secs. 3, 4) 87
Plymouth Colony Laws, Part III, p. 282 (Rev. Laws 1671, Chap. XI, Sec. 2) 86
Political Code, Sec. 33 117
Political Code, Sec. 675 ..... 127, 204
Political Code, Sec. 690.10 123
Political Code, Sec. 2906 122
Public Laws of Rhode Island and Providence Plantations, 1798 (H & O Farnsworth Ed.), pp. 3-4 92
Public Laws of Rhode Island and Providence Plantations, 1844 (Knowles & Vose Ed.), Sec. 9, p. 531 92
Public Resources Code, Sec. 6321 123
Public Resources Code, Sec. 6871 129
Public Resources Code, Secs. 6871-6878, Cal. Stats. 1941, p. 1902 (State Lands Act of 1938) 129
Revised Statutes, Sec. 355 283
Revised Statutes of Maine, 1944, Chap. 1, Sec. 24 155
Revised Statutes of New York, 1829, Part II, Chap. I, Title I, Sec. 1 98
Rhode Island Acts and Laws (1730), p. 9 83
Rhode Island Acts and Laws 1730-1736 (James Franklin's Ed.), p. 277, adopted June 2, 1736 92
Senate Bill No. 6385 of the 62nd Congress 159

PAGE

South Carolina Civil Code (1902), Part I, Title I, Chap. I, Sec. 1 113

South Carolina Civil Code (1912), Part I, Title I, Chap. I, Sec. 1 113

South Carolina Civil Code (1933), Sec. 1016 113

South Carolina Civil Code (1942), Volume II, Sec. 3300 113

South Carolina Constitution (1868), Art. I, Sec. 40 112

South Carolina Constitution (1868), Art. VI, Sec. 3 112

South Carolina Revised Statutes (1873), Part I, Title I, Chap. I, Sec. 1 112

South Carolina General Statutes (1882), Part I, Title I, Chap. I, Sec. 1 112

State of Washington Constitution, Art. XVII, Sec. 1 ..... 151, 152

Territorial Waters Jurisdiction Act (1878), 41 and 42 Vict. c. 73 70

United States Code Annotated (38 Stats. 692), Sec. 781 159

United States Code, Annotated, Title 5, Sec. 309 (R. S., Sec. 359) 35

United States Code Annotated, Title 16, Sec. 632 161

United States Code Annotated, Title 16, Secs. 761-769 161

United States Code Annotated, Title 30, Sec. 181 297

United States Code, Annotated, Title 33, Sec. 151 19

United States Code, Annotated, Title 34, Sec. 520 283

United States Code, Annotated, Title 40, Sec. 255 283

United States Code, Annotated, Title 50, Sec. 175 283

United States Code, Annotated, Sec. 291 (R. S., Sec. 346) 35

United States Constitution, Art. I, Sec. 8, Clause 17 8

United States Constitution, Art. IV, Sec. 3 38

9 United States Stautes, p. 452 141

23 United States Statutes 53, 58 22

Virginia Code, Tit. 27, Chap. 127, Sec 3176 109

Virginia Statutes (1936), p. 663 109

MISCELLANEOUS PAGE

Annual Reports of the Chief Engineers, 1890, United States Army, Part 4, p. 2885.....174

Bulletin No. 321 of the Department of Interior, United States Geological Survey (Government Printing Office, 1907).....156

29 Geographical Review (1939), pp. 358-382, Griswold, Hunting Boundaries With Car and Camera in the Northeastern United States 96

Georgia Colonial Records of the State, Part II, p. 214.....114

Hearings before Committee on Public Lands and Surveys, United States Senate, 76th Congress, 1st Sess., S. J. Res. 83 and S. J. Res. 92, of March 27-30, 1939, pp. 281-330....157, 158

6 Opinions of Attorney General, 326, 330, 335..... 34

30 Opinion of Attorney General, p. 428.....255

1 Roll. Abr. 258, line 13..... 39

2 Roll. Abr. 170..... 47

Rot. Parl., 8 Hen. 5, n. 6..... 39

Senate Document 190, 62nd Cong., 2nd Sess., transmitted by President Taft to the Senate and House of Representatives of Congress on Dec. 18, 1911.....152

Senate Document No. 190, 62nd Cong., 2nd Sess., pp. 40, 44; also pp. 6, 7, 19.....152

Senate Document No. 190, Letter of Oct. 5, 1911, from the Department to its Solicitor, pp. 43, 129.....153

Senate Report No. 904, 62nd Cong., 2nd Sess., reporting Senate Bill No. 6385, which was revived in the 63rd Cong. as Senate Bill No. 5313, which then became the Act of August 15, 1914. See Senate Report No. 488 of Senate Committee on Fisheries, 63rd Cong., 2nd Sess.....160

Senate Joint Resolution 83, 92 (76th Cong., 1st Sess.).....34, 37

Senate Joint Resolution 208 (75th Cong., 3rd Sess.).....34, 37

PAGE

United States Department of Agriculture, Department Bulletin 1191, dated December, 1923, entitled "Potash from Kelp," by R. P. Brandt and J. W. Turrentine, p. i.....154

United States Department of Agriculture Report No. 100, "Potash from Kelp," by Frank K. Cameron, issued April 10, 1915, pp. 1, 29-30.....154, 155

Webster's Dictionary 24

TEXTBOOKS

24 American Jurisprudence Int. L. (1930), p. 541, Boggs, Delimitation of the Territorial Sea..... 23

3 American Law Reports, p. 945.....190

Angell, The Right of Property in Tide Waters (1826), pp. 17-18) 62

Angell, The Right of Property in Tide Waters (1826), pp. 37-38 41

Bacon, New Abridgment of the Law (1736)..... 48

Bacon, A New Abridgment of the Law (Bouvier's Ed., Philadelphia, 1869), Vol. 8, p. 18..... 49

Bainbridge, Mines and Minerals (1st Ed., London, 1841), see 1st Am. Ed., 1871, from 3rd London Ed., p. 13..... 64

2 Blackstone's Commentaries (1765), p. 262..... 50

Boroughs, The Sovereignty of the British Seas (Wade's Ed., Edinburgh, 1920), p. 43..... 44

Callis, The "Reading" Upon the Statutes of Sewers (4th Ed., 1824) 41, 42

Chitty, Prerogatives of the Crown (London, 1820), p. 173..... 62

Coke, The Fourth Part of the Institutes of the Lawes of England (4th Ed., London, 1669), pp. 140-142..... 43

Colonial Laws of New York, p. 122..... 99

1 Colonial Laws of New York, pp. 409, 845 98

2 Colonial Laws of New York, pp. 311-312, 655, 1067..... 98

PAGE

Comyns, Digest of the Laws of England (First Am. Ed. from Fifth London Ed., 1825), pp. 166, 167 49

Crocker, The Extent of the Marginal Sea (1909), p. 98 70

Diggs, "Arguments Proving the Queenes Maties Propertye in the Sea Landes and Salt Shores Thereof," p. 187 39

3 Documentary History of the Constitution, p. 137 77

Donaldson, The Public Domain (1888), p. 32 79

Donaldson, The Public Domain (1888), p. 43 84

Drayton, "Views of South Carolina" (1802), II Code of So. Car. (1940), Sec. 2038 111

Fenn, The Origin of the Right of Fishery in Territorial Waters (1926):

Page 171 39

Pages 172-173, 177-178 40

Pages 178-179 42

Pages 180-181, 362-363 43

Pages 197-198 44

Fulton, Sovereignty of the Sea (1911):

Pages 16-17 ..... 39, 40

Pages 19, 364-366, 369-374 44

Pages 357, 358 40

Pages 362-363 43

Page 514 47

Page 525 48

1 Hackworth, "Digest of International Law" (1940), pp. 654, 655 287

5 Hackworth, "Digest of International Law" (1940), pp. 495, 496 304

Hale, De Jure Maris (Manuscript, circa 1667) 46, 50

Halleck, International Law (4th Ed., London, 1908) 70

Hargrave & Butler's Coke on Littleton (1853), p. 261a 48

PAGE

Higgins & Colombos, International Law of the Sea (1943), p. 38 39

Holmes, The Common Law, p. 211 14

Hurst, "Whose Is the Bed of the Sea?" 4 British Year Book of International Law, 1923, p. 34 64

Jerwood, A Dissertation on the Rights to the Sea Shores (London, 1850), pp. 13, 40-41, 43-45 64

Lauterpacht, "Private Law Sources and Analogies of International Law" (1927), Secs. 87 and 88 304

Lauterpacht, "Private Law Sources and Analogies of International Law" (1927), pp. 224, 232, 248, 253-255, 259, 268-269, 280 304

2 Lindley, Mines (3rd Edition, 1914), pp. 1015-1016 151

2 Lindley on Mines (3rd Ed., 1914), p. 1017 287

3 Lindley on Mines (3rd Ed., 1914), p. 2401 287

Macswinney on Mines (1st Ed., London, 1884), see 5th Ed., 1922, p. 33 64

Mallory, De Jure Maritimo et Navali, or a Treatise of Affaires Maritime and of Commerce (London, 1676) 47

Malynes, Consuetudo: vel, Lex Mercatoria (London, 1656), pp. 130-134 40

10 McKinney's Consolidated Laws of New York, Sec. 150 101

10 McKinney's Consolidated Laws of New York, Sec. 300 100

McNair, "The Legality of the Occupation of the Ruhr" (1924), The British Book of International Law, pp. 17, 34-36 304

Meadows, Observations Concerning the Dominion and Sovereignty of the Seas (1689) 48

Moore, History and Law of the Foreshore and Sea Shore (London, 1888):

Pages 185-202 39

Pages 318, 370, 413 45

Pages 370 et seq 46

Page 653 64

Pages 667-892 63

PAGE

Patton on Titles (1938), p. 577 151

Plucknett, Concise History of the Common Law (1929), p. 205 45

Plucknett, Concise History of the Common Law (1929), p. 207 50

1 Poore, Federal and State Constitutions of the United States (1878), p. 256 83

1 Poore, Federal and State Constitutions of the United States (1878), p. 373 ..... 85, 114

1 Poore, Federal and State Constitutions of the United States (1878), pp. 775, 1271 82

1 Poore, Federal and State Constitutions of the United States (1878), pp. 783-784 84

1 Poore, Federal and State Constitutions of the United States (1878), pp. 811-812 ..... 84, 106

1 Poore, Federal and State Constitutions of the United States (1878), pp. 922-926 80

1 Poore, Federal and State Constitutions of the United States (1878), pp. 933-935 81

2 Poore, Federal and State Constitutions of the United States (1878), pp. 1328, 1383, 1390 84

2 Poore, Federal and State Constitutions of the United States (1878), pp. 1379-1382 79

2 Poore, Federal and State Constitutions of the United States (1878), pp. 1383, 1390 109

2 Poore, Federal and State Constitutions of the United States (1878), p. 1410 110

2 Poore, Federal and State Constitutions of the United States (1878), p. 1900 79

2 Poore, Federal and State Constitutions of the United States (1878), p. 1903 ..... 80, 108

Reisenfeld, Protection of Coastal Fisheries Under International Law (1942), pp. 9-12 40

PAGE

Reisenfeld, Protection of Coastal Fisheries Under International Law (1942), p. 20 48

2 Rhode Island Colonial Records, p. 128 91

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936), p. 417 10

Rogers on Mines (1st Ed., London, 1864), see 2d Ed., 1876, pp. 178, et seq 64

The Collected Papers of John Bassett Moore, Vol. VII, p. 294 71

The Public Laws of the State of Rhode Island and Providence Plantations, 1798 (Carter and Wilkinson, 1798 Ed.), p. 496 92

2 Thorpe, American Charters, Constitutions and Organic Laws p. 765, et seq 85

2 Thorpe, American Charters, Constitutions and Organic Laws pp. 771, 794 114

3 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 1847-1851 80

3 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 1678-1679 ..... 84, 106

3 Thorpe, American Charters, Constitutions and Organic Laws (1909), p. 1870 81

4 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 2434, 2454, 2472, 2495 94

4 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 2443-2444 82

5 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 2534, 2547 101

5 Thorpe, American Charters, Constitutions and Organic Laws (1909), p. 2762 109

5 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 3788, 3789 110

6 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 2210, 3220 91

PAGE

6 Thorpe, American Charters, Constitutions and Organic Laws (1909), p. 3219 83

6 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 3284-3285, 3297, 3342 112

7 Thorpe, American Charters, Constitutions and Organic Laws (1909), pp. 3804, 3818, 3819 108

4 Tiffany, "Real Property" (3rd Ed., 1939), Sec. 959 190

Tomasevich, "International Agreements on Conservation of Marine Resources" (1943), pp. 21-23, 42 161

Welwood, An Abridgment of the Sea Laws (London, 1636), p. 188.9 40

Woolrych, Treatise on the Law of Waters and Sewers (1st Ed. 1830), 1st Am. Ed. from 2d London Ed. (1853), pp. 32, 47 ..... 39, 63, 64

55 Yale Law Journal (April, 1946), p. 467 78

[redacted]

BLANK
PAGE

BLANK
PAGE

APPENDIX A.

There Is No Case or Controversy Under Article III, Section 2 of the Constitutions

We are concerned here, not with the technical form of this proceeding, but only with the fundamental question whether it presents a case or controversy within the constitutional power of the Court to adjudicate.

The alternative allegations of the complaint leave the question in doubt as to whether plaintiff seeks a declaration by the Court of the respective governmental powers of plaintiff and defendant or some form of real property decree in the nature or quiet title or ejectment.

Plaintiff asserts (Br. p. 207, note) that "the Complaint seeks merely a declaration of rights and relief *looking to the future;* . . ." The prayer of the complaint is for a decree "declaring the rights of the United States as against the State of California in the area claimed . . ." and for an injunction to prevent the State and "all persons claiming under it from continuing to trespass upon the area . . ."

We make no point as to the uncertainty in the *form* of the action. We propose to show that no case or controversy exists because the only decree which could be rendered herein would be an advisory opinion upon an abstract and hypothetical state of facts. We will discuss this question under two heads:

A. There is no controversy in a legal sense, but only a difference of opinion between Federal and State officials.

B. It is impossible to identify the subject matter of the action.

A. There Is No Controversy in a Legal Sense, But Only a Difference of Opinion Between Federal and State Officials.

This action is the result of doubts which exist in the minds of certain Federal officials as to the rights and powers of the Federal government with respect to the marginal sea. These doubts culminated in the filing, in May, 1945, of the suit entitled *United States v. Pacific Western Oil Corporation,* in which the United States asserted rights in the marginal sea superior to those of the State of California. This action was dismissed when the present suit was filed.

Some assertions of Federal rights were made by Federal officials in connection with proposed joint resolutions introduced into Congress in 1938 and 1939, which were designed to instruct the Attorney General to file an action similar to the present one.[1] So far as we know, these are the only assertions by officers of the United States prior to the filing of this action of ownership or paramount rights in the marginal sea. None of these assertions was ever officially communicated to the State of California.

It is important to note that although Federal officials have expressed doubts and have, in the instances above mentioned, asserted superior powers, *they have neither taken nor attempted to take any action to enforce the*

---

[1]Congress refused to pass any such legislation.

rights or powers which they say belong to the Federal Government. Nor has Congress ever passed any statute authorizing or directing that Federal officials take any action with respect to these asserted Federal powers.

This is not a case like *United States v. Utah,* 283 U. S. 64 (1931) wherein the complaint showed that the Secretary of the Interior had issued prospecting permits covering the "riparian and river bed lands" and *the permittees of the United States were in actual possession* of the property which was the subject of the action. The State of Utah had also issued prospecting permits covering the same lands. There was, therefor, an actual exercise of the claimed Federal powers which was interfered with and contravened by State action. In the present case there is absolutely nothing before the Court except the *assertions* of the Federal officials on the one hand and the fact that the State officials deny the validity of those assertions on the other. Such a dispute does not present a justiciable controversy.

More specifically, this suit arises out of the fact that for some eight years the Secretary of the Interior has been in doubt as to his power to issue Federal oil and gas leases of submerged lands off the coast of Southern California. During that period some 200 such applications have been filed in his office. But *none of these has been acted upon.* There has been nothing to prevent the Secretary from acting except his own doubts. It is these doubts which the Supreme Court is now asked to resolve.

At the hearings before the Senate Judiciary Committee on February 5, 1946 (referred to in Plaintiff's Brief pp. 144 and 145, the former Secretary testified that prior to 1937 he had denied all applications for Federal oil and gas leases off the California coast on the ground (among others)[2] that "the several states owned this land beneath the waters. . . ." The Secretary then explained his change of policy as follows:

> "But *applicants and their lawyers* continued to insist that the United States does own the land and the oil and that the Department does have the power to grant them oil and gas leases. *So we began to have doubts.* At the same time, Congress had before it proposed legislation,[3] which would in one way or another have resulted in judicial proceedings to decide the issue.
>
> "Consequently, since 1937, action on all of these applications, of which there are about 200, has been suspended, pending a judicial determination.[4] It is true that I have on occasion considered the issuance of a single oil lease on submerged coastal lands as a

---

[2]There is doubt also whether the Leasing Act of 1920 as amended applies even if the lands belonged to the Federal Government.

[3]The legislation referred to was designed to instruct the Attorney General to file an action similar to the present one. Congress refused to pass any such legislation. See Appendix B, *infra*, pp. 33-37.

[4]Many of these applications describe enormously valuable and highly improved filled lands which lie below the original low-water mark in Long Beach Harbor (see map in Brief, p. 5). The applicants ask the Secretary to give them Federal leases on these lands and by his inaction since 1937 title to these valuable public and privately owned lands has remained clouded for ten years. It was these applicants and their lawyers who caused the Secretary to have doubts.

possible way of precipitating a test suit to settle the issue, but the pending Government suit has made any such device unnecessary.

"So as soon as I realized that there were substantial doubts as to the validity of the States' claim to submerged coastal lands below low-water mark, *I stopped all action* in the Department which was based on the assumption that the States owned these submerged lands, *and began to press for a judicial solution of the debated issue of law.* This, I most readily concede, was a change from the earlier action of myself and of the Department."

It is important to note here that the Secretary was not frustrated or interfered with by the State in the performance of any of the duties of his office or in the exercise of any alleged Federal powers. On the contrary, he simply "stopped all action." The only thing that prevented him from acting was his own doubts. This Court said in *Willing v. Chicago Auditorium,* 277 U. S.. 274, 289 (1928):

"The fact that plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action."

An examination of the complaint and brief will show that in so far as the claim of paramount powers is concerned there is nothing before this Court but a conflict of official opinion. No issue exists as to the *exercise of any specific governmental power.* The Court is simply asked for a "judicial solution of the debated issue of law."

A situation very much like that presented here was before the Court in *United States v. West Virginia,* 295 U. S. 463 (1935), wherein it was held that "rival claims of sovereign power made by the national and a state government" do not create a justiciable controversy. In that case State officials asserted a right superior to that of the Federal Government to license the use of certain navigable rivers within the State for the production and sale of hydro-electric power. State officials had actually issued licenses and permits under State laws for that purpose. Federal officials denied the asserted State power and claimed that Federal power was paramount. This court was asked to settle this debated question of law.

So, in the present proceeding, the complaint asserts that the United States owns or has paramount powers over the marginal sea. It is alleged that California has denied these assertions and has issued leases permitting the exploitation of minerals in the marginal sea, just as in the *West Virginia* case the State officials had issued permits and licenses on the assumption that the State's power was paramount.

In the *West Virginia* case the court said (p. 474):

> "General allegations that the State challenges the claim of the United States that the rivers are navigable, and *asserts a right superior* to that of the United States to license their use for power production, raise an issue too *vague and ill-defined* to admit of judicial determination. They afford no basis for an injunction perpetually restraining the State from asserting any interest superior or adverse to that of the United States. . . ."

This holding would appear to be particularly applicable to the "general allegation" in Paragraph VIII of the

present complaint regarding California's challenge to the Federal claims. Paragraph VIII reads, in part:

> "The State has frequently and publicly denied the rights, powers and title of the United States in the area and has claimed fee simple title to the area for itself and, unless the rights of the United States are established and declared by this Court, the State will continue to claim such title for itself and to exercise the rights incident to such title through its officers, agents and employees, . . ."

In the *West Virginia* case there was a Federal statute, *i.e.*, the Federal Water Power Act, under which Congress had actually asserted the right and power of the Federal Government to deal with the navigable waters in question. But the Court nevertheless held that the opposing assertions and acts of ownership by West Virginia constituted no actual invasion of or interference with the rights of the United States. The present case is even stronger because the Congress has never passed any statute asserting any right or claim over the marginal sea and, as we have said, no attempt has ever been made by Federal officials to exercise the asserted Federal powers. Instead, the Secretary of the Interior has declined to act on applications for Federal leases, or otherwise to take any action at all looking toward enforcement of the claimed Federal rights, and has merely expressed his doubts as to the extent of his statutory and constitutional powers. The acts and assertions of the State of California, therefore, as said in the *West Virginia* case, constitute no invasion of or interference "with *the exercise of authority* claimed by the United States." That the State's acts contravene the *opinions* of Federal officials as to the rights of the United States is the most that can

be said, and this clearly does not present a case or controversy.

Furthermore, the practical impossibility of adjudicating the respective governmental rights and powers of the United States and California in the marginal sea is illustrated by the fact that plaintiff does not and apparently cannot define the paramount rights and powers which it claims. And while plaintiff admits that California has *some* rights in the marginal sea (Complaint par. VII), it is impossible to determine what they are. The assertion in Paragraph VII that California has the same governmental powers over the marginal sea "which it has with respect to *other lands of the United States within the territorial jurisdiction of the State*" means nothing, because in some instances California has ceded exclusive jurisdiction to the Federal Government (under Art. I, Sec. 8, Clause 17, Const.) and in other instances retains complete legislative powers. The Federal Government owns still other lands in California over which partial or limited jurisdiction has been ceded by the State. The governmental powers of California and hence of the Federal Government differ as to each of these types of land. Under these vague and uncertain allegations plaintiff asks the Court, in the prayer of the complaint, to declare "the rights of the United States as against the State of California in the area claimed . . ." If this means what it says, plaintiff is asking this Court to define and declare *all the respective governmental powers* of the State and the Federal Government in the marginal sea. We submit that such a declaration would be a practical impossibility—and even if it could be done, would be an adjudication *in the abstract* of innumerable questions affecting navigation,

fisheries, minerals and innumerable other interests which are involved in the coastal waters of the State.

Such an adjudication would fill volumes and would deal with hypothetical situations only. Obviously, such a decree should await cases presenting particular facts. The courts have never undertaken to declare the limit of the respective powers of the States and the Federal Government by any general over-all pronouncement, but have established these limits point by point in actual cases presenting specific facts. A decree such as that asked in the prayer in this case would be advisory in the most extreme sense.

It might be urged that the relief sought is proper under the Declaratory Judgment Statute of 1934 (48 Stat. 955), although the action was not brought under that statute. Assuming that this Act is applicable to original proceedings in the Supreme Court,[5] the Court is, nevertheless, without jurisdiction unless a case or controversy in the constitutional sense is presented. In the case of *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227 (1937), this Court held that in an action for declaratory relief there must be a "controversy admitting of specific relief through a decree of a conclusive character" as distinguished from an advisory opinion.

---

[5]In *Arizona v. California,* 283 U. S. 423, 464 (1931), decided prior to the enactment of the Declaratory Jugment Statute, the Court said: "This Court cannot issue declaratory decrees." It does not appear whether this statement was predicated upon the absence of constitutional power or upon the fact that Congress had provided no procedure for declaratory judgments in original proceedings.

In the *West Virginia* case the court said, regarding the declaratory judgment statute (p. 475):

> " . . . that act is applicable only 'in cases of actual controversy.' It does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution."

The abstract character of the controversy attempted to be presented here would not be altered by calling it a proceeding for declaratory relief. The question before the Court still remains only a debated question of law as to which Federal officials seek an advisory opinion before proceeding to act upon matters pending before them.

It has been determined by this Court from the beginning of its history that it has no constitutional power to render advisory opinions to Federal officers. Not even the President can properly ask the Supreme Court to resolve his doubts as to his constitutional powers.[6]

B. It Is Impossible to Identify the Subject Matter of the Action.

Plaintiff has predicated its entire case upon the theory that distinctions exist between inland waters and marginal sea which can furnish the basis for an adjudication of rights in real property as between State and Federal Governments. In its brief (pp. 9 and 66) it states that there are "pivotal" and "crucial" distinctions between the three-mile belt on the one hand and bays, harbors and "in-

---

[6]See letter of Chief Justice Jay declining to render an advisory opinion to President Washington set out in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), p. 417. See also *Muskrat v. United States*, 219 U. S. 346, 354 (1911).

land waters" on the other hand. Plaintiff concedes that the State is the owner of the "inland waters," ports, bays and harbors and lands between high and low water. Obviously, then, if the distinction claimed does not exist *as a basis for adjudicating titles to real property,* plaintiff has not stated a case or controversy.

The only ground advanced by plaintiff in support of this alleged distinction is the argument that the three-mile belt is a creature of international law and for this reason proprietary rights in the three-mile belt vested in the Federal Government, whereas, the rights in inland waters which are vested in the States were not created by international law. This is the "crucial" and "pivotal" distinction upon which plaintiff's entire case hinges. We shall show at the proper time that this distinction is totally unfounded and that proprietary rights as between States and Federal Government never were and never could be predicated on international law. (Brief, pp. 186-191.) But, for the purpose of determining whether a case or controversy is presented, we shall assume (without admitting it) that the distinction alleged by plaintiff could exist. We propose to show that, even under this assumption, it would be impossible to render a decree which could be made applicable to any particular land.

The basic requirement of a justiciable controversy is that it "must be *definite* and *concrete,* . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[7]

---

[7] *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227 (1937).

(a) PLAINTIFF HAS FAILED TO IDENTIFY THE LANDS CLAIMED.

In the present case plaintiff seeks to obtain a decree adjudicating rights in an undefined area of land "lying seaward of ordinary low water mark . . . and outside of inland waters" of California. In its brief plaintiff asserts (p. 2) that "No claim is here made to any lands under ports, harbors, bays, rivers, lakes, or any other inland waters; . . ." It must be assumed, therefore, that ports, bays and harbors are included within the term "inland waters" and that the area claimed is a three-mile strip lying outside of such waters. Plaintiff does not and cannot define what is meant by ports, bays and harbors and "inland waters," and as to several of the most important ports, bays and harbors in California plaintiff asserts that it is in doubt whether they constitute "inland waters" or "open sea."

No description or identification of the lands which are the subject of this action, other than that quoted in the preceding paragraph, can be found anywhere in plaintiff's complaint or brief, except that the area claimed is also referred to in the brief as being "the marginal sea." The marginal sea is described as being a three-mile strip measured seaward "from the mean low water mark or from the seaward limit of a bay or river-mouth." (Br. p. 18.) Inland waters are described as being inside the marginal sea; that is, "landward of mean low-water mark and of the seaward limit of bays and mouths of rivers." (Br. p. 18.) The essence of the matter is that the marginal sea is a belt of sea which is seaward of inland waters, and inland waters are those waters which are landward of the marginal sea.

We submit that these terms describe no lands which can be identified—they merely refer to the existence of an undescribed and unidentified area somewhere near the California coast. A decree purporting to adjudicate ownership of such an area and to enjoin the State and those claiming under it from trespassing thereon would be purely hypothetical. Such a decree would not adjudicate rights in any particular tract or area of land and *no alleged trespasser would know upon what land he was forbidden to trespass.* Such a decree would merely declare abstract principles which could be used for the guidance of the Secretary of the Interior and as the basis for subsequent actions in which specific relief could be granted.

This is not a case of a technical uncertainty in a description. It is a failure to present a claim as to any area which is susceptible of a description in a judicial decree.[8]

The basic fallacy of plaintiff's case is that it assumes that ownership of land can be determined in the abstract *before* it is determined what land is to be the subject of the decree. In other words, plaintiff asks the Court to render a decree adjudicating title to land independently

---

[8]If it should be urged that the case of *United States v. Utah*, 283 U. S. 64 (1931), supplies a precedent for the present action, reference to the complaint in that case (paragraphs II, III and IV) will show that the lands in issue were carefully described and identified by State, County and Township boundary lines and by reference to known geographical features. It was further alleged that the river-beds were "plainly traceable upon the ground by water marks along each side thereof; . . ." A map was also attached showing the course and location of said rivers. The parts of the river bed not claimed were described by Section and Township numbers. None of the uncertainties created by the attempt to describe lands as "outside inland waters" were present in that case. The *identity and description* of the disputed lands were accurately set forth and were admitted in the answer.

of any identification of the land to which that decree is to be applied. Such a procedure would be wholly outside the judicial power. Unless the decree could be applied to particular land it would necessarily be abstract. As the court said in the *Aetna* case, it would be an opinion "upon a hypothetical state of facts."

It might, indeed, be convenient for plaintiff to have the question answered in the abstract as to who owns the bed of the marginal sea and who owns the bed of "inland waters," leaving the plaintiff free to select which bays and harbors it will claim to own. For the Court to issue such an abstract advisory opinion before the lands to which it is to be applied are identified, would, we submit, be an unconstitutional exercise of judicial power.[9]

(b) It Would Be Impossible to Render a Decree in This Case Which Could Be Made to Apply to Any Particular Land.

"The first call of a theory of law is that it should fit the facts."[10] The theory (even if it were tenable) that title to lands beneath the marginal sea outside bays, ports and harbors vested in the Federal Government under international law does not furnish any test by which it can be determined where the dividing line is to be placed between ports, bays and harbors and marginal sea. The truth is, as we shall show, that neither international law nor any other law supplies any rule or principle by

---

[9]*Muskrat v. United States,* 219 U. S. 346 (1911); *New Jersey v. Sargent,* 269 U. S. 328 (1926); *In re Summers,* 325 U. S. 561 (1945).

[10]Holmes, *The Common Law,* p. 211.

which ports, bays and harbors can be defined and delimited so as to set them apart from the marginal sea. Plaintiff's theory that such a distinction can be made the basis of establishing titles to real property is totally at variance with the physical facts and practical problems involved.

It must be remembered that we are dealing with titles to real property, hence exact boundaries would have to be fixed. The *dividing line* between bays, ports and harbors and marginal sea would have to be established *by court decree* before anyone could buy, sell, lease, mortgage, improve or otherwise deal in any lands adjacent to this line or before the cities or the State could levy taxes and adjust their tax rolls to the new findings of ownership. Plaintiff's theory apparently assumes that the coast line of California is readily divisible into open coast on the one hand and "inland waters," including ports, bays and harbors on the other. The California coast, though not as irregular as the coast of Maine, has very few stretches which can be definitely classified as "open coast." The coast line is a succession of curves, indentations, coves and inlets, separated by sharp points or rounding headlands. These indentations are of every conceivable shape and size and there are literally hundreds of them. Which of these indentations constitute "bays and harbors" or inland waters under plaintiff's theory that legal title to real estate depends on their status, cannot be determined.

Plaintiff itself cannot apply its theory in particular instances and for that reason does not know and cannot inform the Court and the defendant what land it is claiming. Plaintiff is "doubtful" whether such historic bays as Santa Monica and San Pedro Bays are "inland

waters" or "open sea."[11] As to San Pedro Bay plaintiff says (Br. p. 228):

> "It is not clear whether San Pedro Bay is to be regarded as *a true bay,* or as open sea. However, the area has been held to be inland waters in *United States v. Carrillo,* 13 F. Supp. 121 (S. D. Cal.)"[12]

As to Santa Monica Bay plaintiff says (Br. p. 231): "in view of the configuration of the coast . . . it is not clear whether this area should be regarded as *a true bay,* notwithstanding that it has been held to be such for other purposes. See *People v. Stralla,* 14 Cal. (2d) 617 (1939)."[13]

What is said by plaintiff about "the configuration of the coast" which forms Santa Monica Bay can be said of hundreds of other configurations of the coast line.

Each of the hundreds of configurations of the California coast has its own peculiar characteristics and local history. Many of these are shown on official maps as bays or harbors. For illustration, we might mention:

San Diego Bay
Mission Bay
Laguna Bay
Newport Bay
Anaheim Bay
Alamitos Bay
San Pedro Bay
Hueneme Harbor
Santa Monica Bay
Morro Bay
Monterey Bay
Half Moon Bay
San Francisco Bay
Bodego Bay
Bolinas Bay
Drake's Bay
Humboldt Bay

---

[11]In this connection plaintiff apparently uses the term "open sea" as synonymous with "marginal sea."

[12]In this case San Pedro Bay was defined as extending a distance of 14 miles from Point Firmin to Huntington Beach. See map in Brief, p. 5. It was held to be a bay largely on "historic" grounds.

[13]Santa Monica Bay lies between headlands 25 miles apart. It was also held to be a bay on "historic" grounds.

The impossibility of laying down any general rule which could form the basis of a decree adjudicating for title purposes which of these bays are inland waters and which are part of the marginal sea is shown by the comment in plaintiff's brief, where it is said (p. 18, footnote 8):

> ". . . There has been some disagreement over the proper classification of large bays and gulfs, *i. e.*, whether they are 'inland waters' or whether they are a part of the 'marginal sea' or of the 'open sea'. When they are less than ten miles in width at their entrance, they are generally deemed to be inland waters. But certain 'historic bays,' like the Delaware, Chesapeake, and Conception bays, are admittedly inland, even though more than ten miles across at their mouth. There has also been some conflict about how lines should be drawn where a number of islands along the coast extend outward several miles from, and somewhat parallel with, the mainland. Since each island is entitled to a marginal belt of three miles, these interlocking belts may enclose a small portion of what would otherwise be a part of the open sea. If these enclosures are not too large, they are generally deemed to be a part of the marginal sea of the adjacent state."

All the problems above outlined exist along the California coast. There are, for example, a number of islands along the coast which extend outward from and somewhat parallel with the mainland. The waters between these islands and the mainland are commonly known, and are designated on official maps, as "San Pedro Channel" and "Santa Barbara Channel," respectively. These channels have the characteristics of "inland waters" but whether they are "inland waters" in the sense used in plaintiff's complaint

has never been determined and no rule or principle exists from which such a determination can be made.

The situation on the California coast is even more complicated than that described by plaintiff, for there is not in California any law or rule of decision that indentations in the coast line must be less than 10 miles in width at their entrance in order to constitute bays.[14] In fact we know of no such law anywhere except as found in certain treaties relating to fisheries. In Massachusetts the distance is fixed at "two marine leagues" by the Statute of 1859. In California the courts have, in three important instances, held that bays having headlands which are more than 10 miles apart constitute "bays".[15]

Furthermore, it appears from the reservations expressed as to San Pedro and Santa Monica Bays that not all bays are exempted from plaintiff's claim, but only "true bays." We respectfully submit that the question of what constitutes "a true bay" is not susceptible of adjudication under any statute or rule of decision.

A legislature may arbitrarily define what shall constitute a bay, as was done by the Massachusetts statute. Or Congress may delegate similar powers to an administrative agency for certain specific purposes. An example of this is the statute under which the Secretary of Commerce is authorized "from time to time to designate and define by suitable bearings or ranges with lighthouses,

---

[14]The California Constitution and statutes include all bays and harbors, within the State's boundary, but do not define these terms and no minimum width at the entrance is specified.

[15]San Pedro and Santa Monica Bays (*supra*) and Monterey Bay, which was held to be a bay on "historic" grounds in *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235 (1927), although the headlands are 18 miles apart.

light vessels, buoys or coast objects; the lines dividing the high seas from rivers, harbors and inland water." (33 U. S. C. A. 151.)

The phrase "inland water," as used in this statute refers only to those waters which happen to be designated by the Secretary *from time to time* and marked by buoys, lighthouses or other objects for the purpose of preventing collision of vessels.[16] When new harbors are developed or old ones are changed by breakwaters or other structures, the Secretary will designate new lines for the purpose of the application of the pilot rules. Obviously this can have no relation to land titles. It cannot be supposed that rights in real property beneath the waters will pass from one sovereign to the other as the result of the decision of the Secretary to move the location of a line of buoys. The way in which this statute has been applied by the Secretary is illustrated by maps of certain harbors published by the United States Coast Guard, entitled *Rules to Prevent Collisions of Vessels and Pilot Rules for Certain Inland Waters,* United States Government Printing Office, March 1946. A copy of these maps is inserted at this point. Reference to such instances as Galveston Bay and the Columbia River will be of interest as illustrating the impossibility of adjudicating land titles on the basis of any arbitrary definition of harbors or inland waters.

Ports, bays and harbors may be and frequently are arbitrarily designated and marked for a variety of particular purposes, but for the Court to make an overall pronouncement declaring, *for title purposes,* what constitutes ports, bays, harbors and inland waters, and distinguishing

---

[16] *United States v. Newark Meadows,* 173 Fed. 426, 428 (1909).

"historic bays" and "true bays" from bays in general, would be, we submit, not only abstract and nonjusticiable but a practical impossibility. This can be readily demonstrated by reference to some of the specific problems that would be involved in attempting such a declaration.

(i) *When does a bay become a "true bay"?*

Plaintiff concedes that a body of water which, in its natural state, does not constitute a "true bay" may, nevertheless, *become* a "true bay" by virtue of *history or tradition.* Delaware and Chesapeake Bays are admittedly true bays on "historic grounds," although more than 10 miles across at their mouths. Being "true bays," these bays presumably come within the category of inland waters, the beds of which are vested in the adjacent States.

This conception of how "inland waters" may be established leads to some startling results when applied to real estate titles.

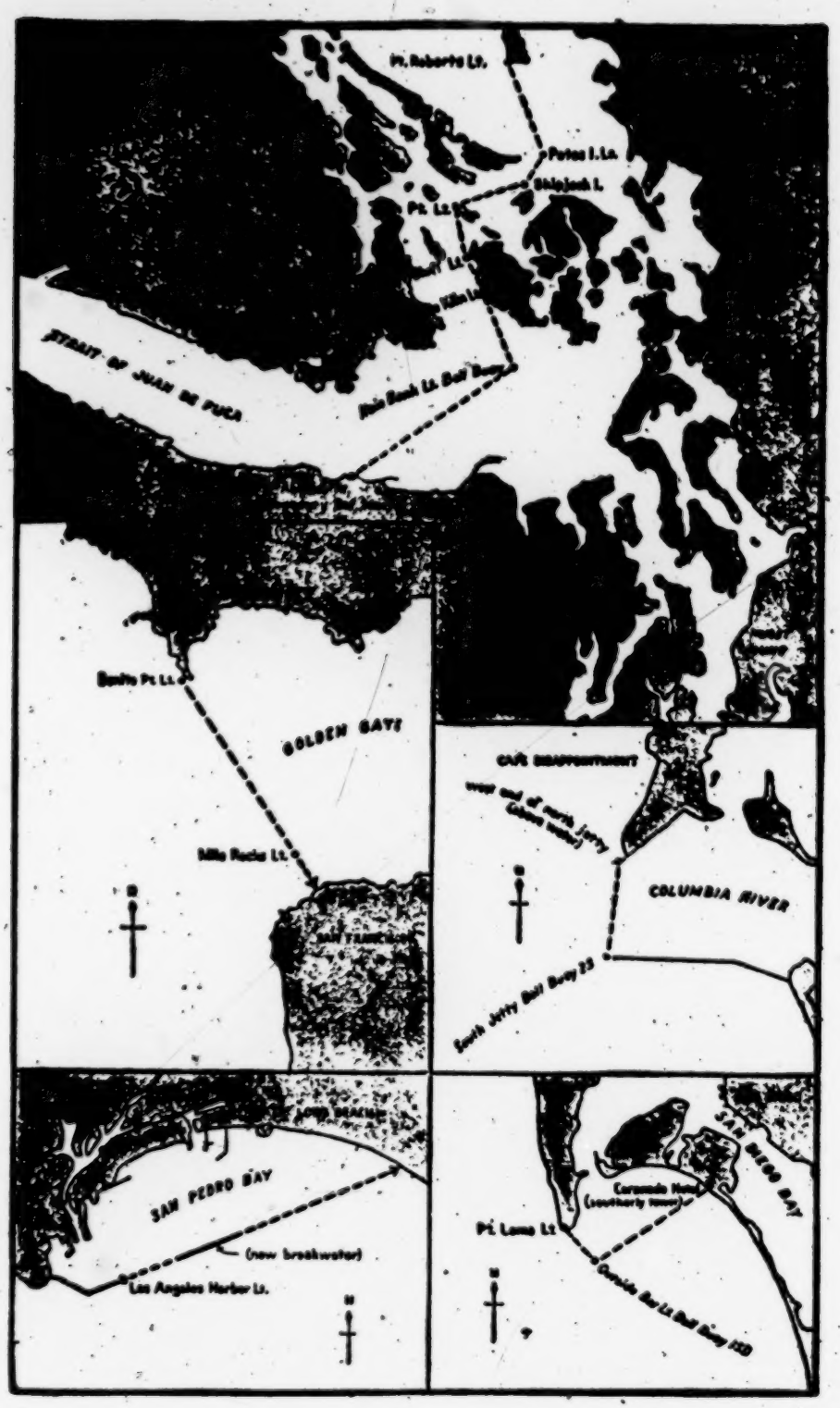
It must be borne in mind that the critical date for the determination of the title or rights of the State to the lands under its navigable waters is the date of the State's admission to the union.[17] It would thus be necessary, in order to determine what lands are the subject of the action, to ascertain which of the many indentations on the California coast constituted "true bays" on *September 9, 1850.* Not only would physical conditions have to be ascertained *as of that date,* but the state of the history and tradition with regard to any particular body of water on September 9, 1850 would have to be determined.

Will it be plaintiff's position that the legal status and title of all bays were irrevocably fixed either by nature or

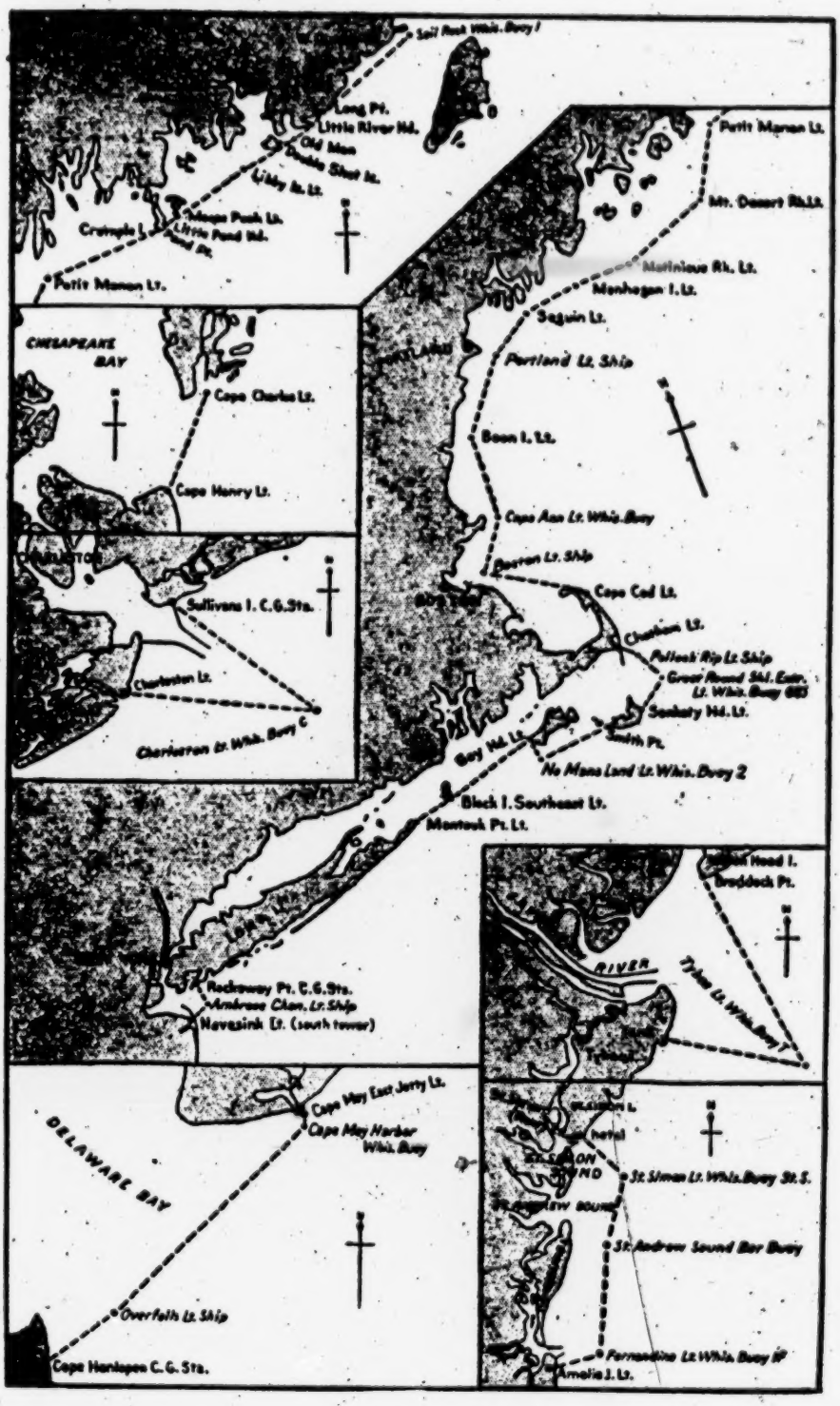
---

[17] *Pollard v. Hagan,* 3 How. 212 (1845); *Shively v. Bowlby,* 152 U. S. 1 (1894).

PILOT RULES FOR INLAND WATERS

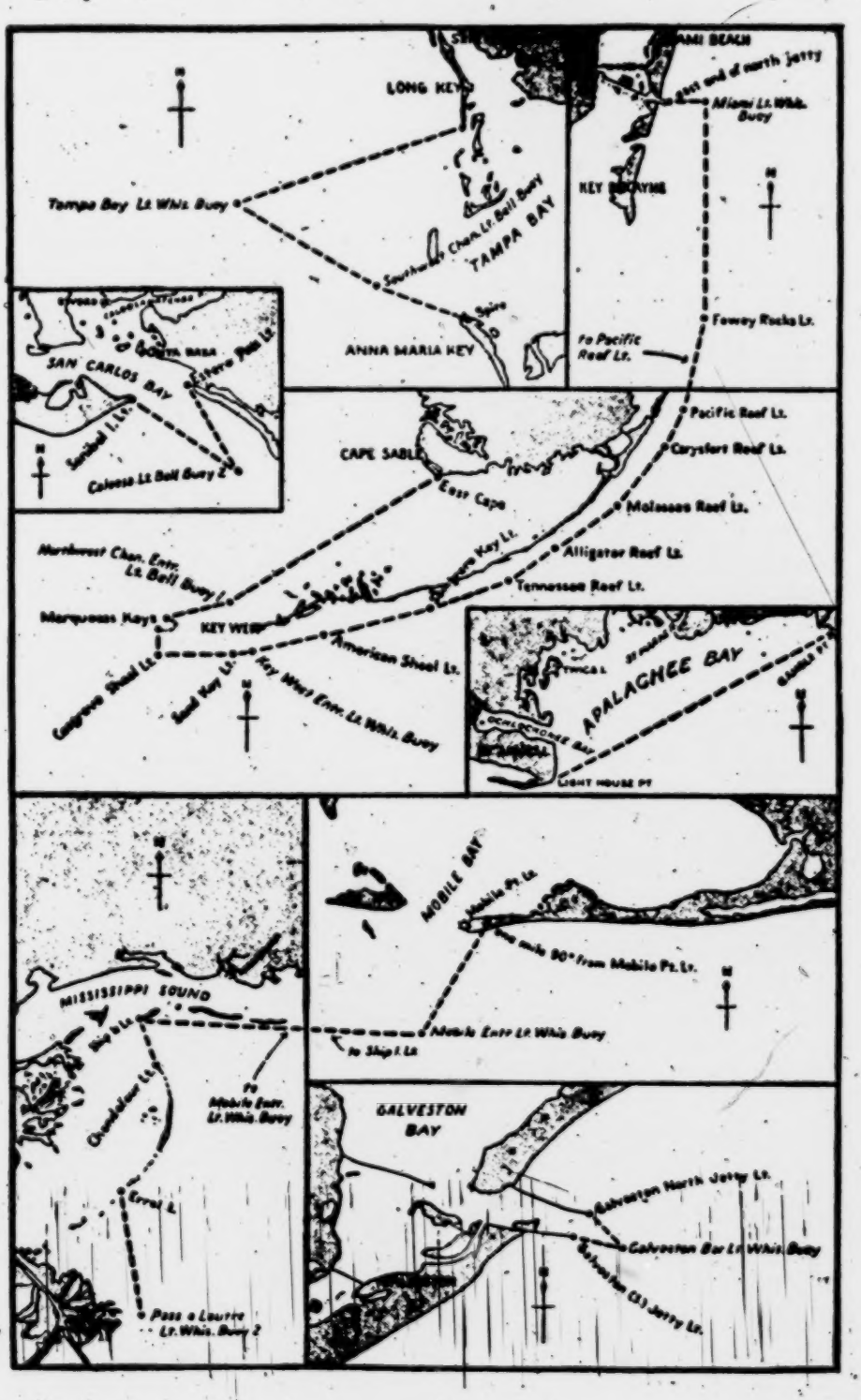


BLANK PAGE


Long Pt.
Little River Hd.
Old Man
Libby Is. Lt.
Crumple I.
Little Pond Hd.
Portit Manan Lt.
CHESAPEAKE BAY
Cape Charles Lt.
Cape Henry Lt.
Sullivans I. C.G.Sta.
Charleston Lt.
Charleston Lt. Whis. Buoy C
Portit Manan Lt.
Mt. Desert Rk. Lt.
Matinicus Rk. Lt.
Monhegan I. Lt.
Seguin Lt.
Portland Lt. Ship
Boon I. Lt.
Cape Ann Lt. Whis. Buoy
Cape Cod Lt.
Pollock Rip Lt. Ship
Great Round Shl. Entr. Lt. Whis. Buoy
Sankaty Hd. Lt.
Gay Hd. Lt.
Smith Pt.
No Mans Land Lt. Whis. Buoy 2
Block I. Southeast Lt.
Montauk Pt. Lt.
Rockaway Pt. C.G.Sta.
Ambrose Chan. Lt. Ship
Navesink Lt. (south tower)
Broddock Pt.
RIVER
Tybee Lt. Whis. Buoy T
Cape May East Jetty Lt.
Cape May Harbor Whis. Buoy
DELAWARE BAY
Overfalls Lt. Ship
Cape Henlopen C.G. Sta.
St. Simon Lt. Whis. Buoy St. S.
St. Andrew Sound Bar Buoy
Fernandina Lt. Whis. Buoy F
Amelia I. Lt.

BLANK
PAGE

UNITED STATES COAST GUARD



BLANK
PAGE

by history on September 9, 1850? If plaintiff takes this position, its repeated assertions that it is not claiming ports, bays and harbors in this action are illusory and to a large extent untrue, for it is certain that many ports, bays and harbors, both in old and new States, have been developed and become generally recognized *since the admission of the particular State into the Union.*

If it is not plaintiff's position that the legal status and title of all bays were irrevocably fixed on September 9, 1850, then (under plaintiff's theory of the case) it would have to be determined, as to each traditional port, bay and harbor and as to every indentation in the coast line, whether it has become a true bay since that date and, if so, at what time. If a body of water which did not constitute a "true bay" on the date the State was admitted to the Union has subsequently, by reason of artificial works or historical factors, become a "true bay," then it must follow, since plaintiff concedes that the States own the beds of "true bays," that title passes from the Federal Government to the State upon the date when the transition from marginal sea to a "true bay" occurs. If this is plaintiff's position, plaintiff will be forced to admit that a State may acquire title as against the United States by long usage—for an "historic" bay is nothing more than a bay by long usage. But plaintiff argues strenuously in its brief (pp. 163, *et seq.*) that titles or rights in land cannot be acquired by a State as against the United States by long usage, acquiescence or any related doctrine. What, then, is its position?

Furthermore, if it should be held that title changes hands when a bay or harbor is artifically created, no judgment that any particular piece of coast line is *not now*

a "true bay" would ever be final. For whenever the growth of a community resulted in the creation of a new harbor the question would have to be determined as to when and to what extent title or rights passed from the Federal Government to the State.

The utter confusion which would be produced by attempting to predicate land titles on any such shifting and uncertain base as the distinction between "true bays" and "marginal sea" not only illustrates the impossibility of granting specific relief in this case but also demonstrates the complete unsoundness of plaintiff's claims.

(ii) *What constitutes a port?*

Still further confusion arises from the use of the term "ports." Plaintiff says it is not claiming "ports." (Br. p. 2.) But a port may exist entirely outside "inland waters." A "port," although it has a variety of meanings, is commonly used to denote a *place of destination*. This may be a wharf projecting into the "open sea" or a roadstead in the "open sea" where goods and passengers are unloaded in small boats.[18]

---

[18]For the purposes of marine insurance an open roadstead has been held to be a port. (*DeLongumere v. N. Y. Fire Ins. Co.*, 10 Johns. 120, 123 (1813)). The limits of a port are, in some instances, fixed by statute. (*Devato v. 823 Barrels of Plumbago*, 20 Fed. 510, 513 (1884).). A Federal statute defines the word "port" as meaning "either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside." (23 Stat. 53, 58, applied in *Ayer & Lord Co. v. Ky.*, 202 U. S. 409, 420 (1905).) The term "port" as used in Rev. Stat., Sec. 4347, has been held to include an island without a port of entry. *Petrel Guano Co. v. Jarnette*, 25 Fed. 675, 677 (C. C. N. C. 1885). In *Hartwell Lumber Co. v. U. S.*, 128 Fed. 306, 308 (C. C. N. D. Ill. 1904), the Court said: "What constitutes a port for the purposes of the revenue act must of necessity be a matter of proof in each case." The terms bays and harbors have equally diverse meanings. (See *Words and Phrases.*)

As an illustration of the problem thus created, mention might be made of the "Long Wharf" formerly existing in Santa Monica Bay but which has now been removed. Prior to the construction of the first breakwater in San Pedro Bay a large amount of commercial shipping was conducted at the Long Wharf above mentioned. This wharf undoubtedly constituted a "port" (irrespective of whether Santa Monica Bay is a "true bay"). Numerous similar "ports" exist on all coast lines. How can the existence of such a port have any bearing on Federal or State ownership of land? If the State owns the land beneath "ports," what land would it own in relation to a commercial wharf projecting into the open sea? Would the land in which the piles were embedded change hands when the wharf is built and revert again to the Federal Government when the wharf is removed or destroyed?

(iii) *When does a bay become open sea?*

The problem of defining bays and harbors is discussed in *Delimitation of the Territorial Sea,* by S. Whittemore Boggs, Geographer, Department of State, 24 Am. J. Int. L. 541 (1930). Regarding bays and harbors Mr. Boggs says (pp. 548-9):

> "There is no other aspect of the problems of delimiting territorial waters which has occasioned as much difficulty as the determination of the particular indentations of the coast—whether called bays, gulfs, estuaries, or anything else—whose waters constitute national or interior waters rather than territorial waters. The North Atlantic Fisheries Arbitration Tribunal, for example, decided that
>
> "'In case of bays, the three marine miles are to be measured from a straight line drawn across

> the body of water at the place where it ceases to have the configuration and charactertistics of a bay.'
>
> "There is as yet, however, *no established rule by which to determine what bodies of water 'have the configuration and characteristics of a bay.*"

The essence of the matter is that the difference between a bay and the open sea is only a difference in *degree* and not in *kind*. There is no generic distinction—and no basis on which a rule of law can be predicated. One of the definitions of the word "bay" given in Webster's Dictionary is: "An inlet of the sea, usually smaller than a gulf, but *of the same general character*. The name is loosely used, often for large tracts of water, around which the land forms a curve, or for any recess or inlet between capes or headlands."

A bay may widen gradually until it is merged in the sea. When does it cease to be a "bay" and become "open sea"? No answer is possible except a purely arbitrary one. So far as the State of Massachusetts is concerned, Massachusetts Bay ceases to be a "bay" at a line where the headlands are two marine leagues apart. This is not because of any principle or formula of general application but simply because the legislature has declared it to be so. Public maps show Massachusetts Bay as extending to a line from Cape Cod to Cape Ann, *a distance of 42 miles.* Is the area between the 6-mile line and the 42-mile line a "true bay"?[19]

---

[19] Plaintiff is "doubtful" whether Massachusetts bay is to be treated as "open sea" or an "historic bay" (Br. p. 254).

Obviously, such questions cannot be answered by any decree which could be rendered *in advance* of a determination of the status of each particular port, bay, harbor or indentation in California's coast line.

It is true that the Complaint purports to describe one parcel of property (Par. VI) which is alleged to be under lease from the State to Pacific Western Oil Corporation. Although that Company is clearly an indispensable party, it is not named as a defendant. This one parcel is referred to merely as an example of an instance in which the State has leased submerged lands for the development of oil. It should be noted, incidentally, that this land lies within what is described on official maps as the "Santa Barbara Channel" and one of the issues as to this particular parcel would be as to whether or not the Santa Barbara Channel is "inland water." Even as to this parcel there would be special issues not presented by the pleadings in this suit. It would seem to us extremely doubtful whether the reference to one small parcel of property described as being below "low tide" is sufficient to obviate the constitutional objection that the relief sought, which is a declaration of rights as between the United States and California in the entire marginal sea of the State, is no more than an advisory opinion. And, obviously, the Court could not, on the basis of a finding as to this one parcel, issue any injunction "against all persons claiming under it [the State of California] from continuing to trespass upon *the area* in violation of the rights of the United States."

It may be argued by plaintiff that the Court might enter a preliminary decree which, if it held that the United States owned the marginal sea, could then be followed by the appointment of a Master who would take specific evidence as to each of the bays and harbors in California, and the location of the mean low-water line on the State's thousand miles of coast. But this would not meet the fundamental constitutional objection, for the reason that, as we have already shown, such a preliminary decree would merely be the pronouncement of an abstract principle made without reference to the particular land to which it is to be applied. An advisory opinion on an abstract principle is not rendered constitutional by calling it a preliminary or interlocutory decree.

Furthermore, if a Master were called upon to take evidence as to the status of each of the ports, bays, harbors and coves on the California coast, specific and separate defenses, and different issues not involved in the present Complaint would certainly be raised in each instance. It would also be necessary to name the parties, if any, who are in possession or who assert adverse claims to the particular lands under investigation. Such a procedure would, in legal effect, be a series of independent lawsuits *involving separate issues and additional parties.*

Thus, the questions here submitted to the Court remain non-justiciable until specific issues are raised as to the actual exercise of powers over identified lands and the parties in possession of such lands are before the Court.

(iv) *What law governs?*

Finally, if this Court is to decide, with the aid of a Master or otherwise, whether or not Santa Monica and San Pedro and all the other bays and curves in the coast line of California are "true bays," it is, we believe, pertinent to ask, what law will be applied? International law furnishes no guide. There is no Federal law on the subject except court decisions as to specific cases, such as *United States v. Carrillo, supra,* which plaintiff declines to accept. Plaintiff also rejects the decisions of the State Courts. So far as we know, Massachusetts is the only State having a statute which *defines* bays in terms of the distance between headlands. Would plaintiff accept this statute as binding even in Massachusetts? If it would, then why not accept the decision of the California Supreme Court? If not, what is the rule of decision?

We mention this uncertainty merely to illustrate the non-justiciable character of the questions before the Court. The court cannot in the abstract define "true bays," ports, harbors and inland waters and marginal sea because they have no legal status. They are not legal subdivisions of either land or water. They are, as we said at the outset, merely loosely descriptive terms which have only the meaning attributed to them by the person using them. They present nothing upon which "the judicial power is capable of acting."[20]

---

[20] *Osborne v. United States Bank,* 9 Wheat. 737 (1824).

In the early case of *Cohens v. Virginia,* 6 Wheat. 264 (1821), the Court defined what is meant by "a case" under the Constitution.

> ". . . What is a suit? We understand it to be a prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being *put in possession* of *that right whereof the party injured is deprived.*'" There must be "the lawful demand of one's right; . . ."

Plaintiff's complaint in this proceeding does not meet this test for the simple reason that it is impossible to determine from it of what rights or of what property plaintiff claims to have been deprived. The present suit contains no "lawful demand of plaintiff's right." No rights are asserted or defined of which plaintiff could be put in possession. It is merely asserted that plaintiff either owns or has some undefined right in some undefined area outside of some undefined waters. Plaintiff does not ask the Court to adjudicate title to any land. In reality, what it asks is that the Court will advise it as to whether there are any general principles of law upon which it could be the owner of lands and, if so, what those principles are. It can then apply those principles to any particular area which it may think they will fit.

That the questions here submitted to the Court are abstract and hypothetical in character (and hence outside the judicial power under our law) is very clearly shown by the decision on similar questions submitted to the Judicial Committee of the Privy Council on appeal from the Canadian case cited as *Attorney General for British*

Columbia v. Attorney General for Canada, [1914] A. C. 153. In Canada there is statutory authority under which the Supreme Court of Canada may be asked for an advisory opinion on certain questions of law and this case arose under that statute. Two of the questions submitted to the Supreme Court of Canada were quite similar in character to those upon which the plaintiff asks the Court to advise in the present case. These questions were (p. 163):

> "2. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, license, or otherwise, the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?
>
> "3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the Province or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, license, or otherwise, the exclusive right or any right to fish below low water mark in the said waters or any of them?"

As to the advisory character of the proceeding and the reluctance of the court, even when authorized by statute, to pass on abstract questions the court said (pp. 161-2):

> "Viscount Haldane L. C. This is the appeal of the Government of British Columbia from answers

given by the Supreme Court of Canada to certain questions submitted to it by the Canadian Government, under the authority of a Statute of the Dominion Parliament. *The questions did not arise in any litigation, but were questions of a general and abstract character relating to the fishery rights of the Province.*

"It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario v. Attorney-General of the Dominion.*[21] It is at times attended with inconveniences, and *it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure,* and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. *Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only*

[21] [1912] A. C. 571.

may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all questions put to them, and have found it advisable to limit and guard their replies."

We have here the considered opinion of the Judicial Committee that

1. Answers to questions, without the previous ascertainment of the facts to which the answers would be applied, are abstract;

2. Principles laid down in abstract form without reference to actual facts, would prejudice future litigants; and

3. It would be practically impossible for answers to such questions to define any principle adequately and safely.

Even with statutory power to give an advisory opinion, the Judicial Committee was extremely hesitant and it narrowly confined the opinion expressed. It is not without interest to note that the Judicial Committee referred to the non-justiciability of such questions in the Supreme Court of the United States.

BLANK
PAGE

BLANK PAGE

APPENDIX B.

The Attorney General Is Not Authorized to Bring or Maintain This Proceeding.

Congress has consistently followed a *policy* for over one hundred years of not asserting ownership in the tide or submerged lands underlying either the marginal sea or the so-called "inland waters". This policy has been confirmed by *affirmative* action on the part of Congress on a number of occasions, declaring and asserting the ownership of the States in the submerged lands underlying the marginal seas as well as their "inland waters."

> ". . . the United States early adopted and constantly has adhered to the *policy* of regarding *lands under navigable waters* in aquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances. . . ."[1]

This *policy* of Congress has been recognized by this Court and other courts in many decisions.[2]

The supporting data with additional affirmative acts showing this to be the policy of Congress are set forth in detail in Appendix G on "Acquiesence".

Congress on two recent occasions has refused to change or alter this policy upon being requested by certain officers

---

[1] *U. S. v. Holt State Bank* (1926), 270 U. S. 49, 55.

[2] For example: *Shively v. Bowlby* (1894), 152 U. S. 1, 43, 48—"settled policy";

Mann v. Tacoma Land Co. (1894), 153 U. S. 273, 284—"the whole policy";

Heine v. Roth (D. C. Alaska, 1905), 2 Alaska 418, 424—"the policy of the United States."

of the Executive Department to do so. In 1938 and 1939 Congress rejected proposed joint resolutions presented to it whereby the ownership of the coastal waters of California and other coastal States would have been asserted on behalf of the United States and the Attorney General would have been directed to file proceedings similar to the instant one.[3]

In 1946 the Senate and the House of the 79th Congress both passed a joint resolution quitclaiming to the States respectively all lands below ordinary high water mark underlying all navigable waters within State boundaries except only those the United States had acquired by purchase, condemnation or donation.[4] While the President vetoed this joint resolution on August 1, 1946, its passage by both branches of Congress evidenced the continued adherence to this policy by Congress.

The present suit was, therefore, brought by the Attorney General not only without any specific authorization from Congress but in direct conflict with the established policy of Congress on the subject. The question is whether the Attorney General has authority to do so in view of this Congressional policy.

The office of the Attorney General was created by Congress by Act of September 24, 1789, fixing his duties as including the prosecution and conduct of suits on behalf of the United States.[5] Thus the power of the Attorney General emanates from Congress. He has

---

[3]S. J. Res. 208, 75th Congress, 3rd Session; S. J. Res. 83, 92, 76th Congress, 1st Session.

[4]S. J. Res. 225, 79th Congress, 1st Session.

[5]6 Opinions of Attorney General 326, 330, 335.

been given general authorization from Congress to bring all proceedings in which the United States is interested.[6] On the other hand, the Attorney General has no authority to bring suits which Congress has directed he shall not institute.[7]

The question here is whether the Attorney General has the right to institute a proceeding on behalf of the United States which is contrary to the established policy of Congress. We believe that he does not have this authority. In *United States v. Pan-American Petroleum Company,* 55 Fed. (2d) 753, 774 (C. C. A. 9, 1932), cert. den. 287 U. S. 612, where the court, in reviewing the authority of the Attorney General to institute and maintain a suit to set aside certain oil leases included within Naval Petroleum Reserve No. 1, said:

> "But it might well have been said, if Congress had given 'charge and control' of litigation as to certain named leases to special counsel, and had expressly

---

[6] 5 U. S. C. A., Sec. 291, R. S. §346; 5 U. S. C. A., Sec. 309, R. S. §359.

[7] *Kern River Company v. United States* (1921), 257 U. S. 147, 155, states that:

> *"In the absence of some legislative direction to the contrary,* and there is none, the general authority of the Attorney General in respect of . . . litigation which is necessary to establish and safeguard its [the United States'] rights affords ample warrant for the institution and prosecution by him of a suit such as this."

United States v. United States F. & G. Co. (C. C. A. 10, 1939), 106 F. (2d) 804, 807 (reversed on other grounds 309 U. S. 506), states that:

> *"In the absence of a controlling statute,* the Attorney General of the United States is authorized and empowered to institute . . . proceedings deemed necessary to safeguard or enforce the rights of the United States."

See *United States v. San Jacinto Tin Co.* (1888), 125 U. S. 273, 284.

> ratified all other leases not specifically condemned, *that Congress had indeed deprived the Office of Attorney General of any jurisdiction as to the unnamed leases.* It would not be supposed that Congress would expect that the Attorney General would file suits to cancel the ratified leases, only to be met by the defense of Congressional ratification. The Department of Justice could not be presumed to indulge in such idle gestures."

It seems apparent that the Attorney General has no power to reverse a policy of Congress intentionally adopted and maintained by it. It would seem equally true that he has no such right to reverse a Congressional policy by indirection through the institution of a proceeding which is inconsistent with the established Congressional policy. It is beyond doubt, we submit, that he has no power to bring a proceeding where specific authorization has been sought from Congress and denied by direct affirmative action.

As the Attorney General is the agent of the United States, obtaining his authority from Congress, he, like any other agent, may not act contrary to his authorization. An agent having general authorization from his principal is powerless to act for his principal in direct opposition to the will of the principal as expressed to the agent on a specific matter even though otherwise included within the previous general authorization.

That, we believe, is the instant case. The specific authorization to file a proceeding similar to the instant one was sought from Congress in 1938 and again in

1939, but Congress refused to grant this specific authorization on each occasion.[8]

Extremely significant is the fact that both in 1938 and 1939 the Secretary of the Navy, his representatives, the Office of the Judge Advocate General of the Navy and representatives of the Attorney General's Office asserted both in writing and orally that *no action could be brought by the Attorney General to have the title to the submerged lands adjudicated unless Congress adopted a joint resolution declaring the ownership and directing that suit be brought.*[9] The Secretary of the Navy in 1939 asserted to Congress the necessity of such a declaration and authorization by stating:

> "Before the issue between those claiming adverse rights in these petroleum deposits and the Government may be settled by the courts, there must be asserted in behalf of all the people of the United States their right to conserve the oil therein for national need. Under the Constitution the authority for such an assertion or claim of right or *declaration*

---

[8]Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, 3rd Session, on S. J. Res. 208, February 23, 24 and 25, 1938, entitled "Title to Submerged Oil Lands," page 59.

Hearings before Committee on Public Lands and Surveys, United States Senate, 76th Congress, 1st Session, on S. J. Res. 83 and S. J. Res. 92, held March 27, 28 and 29, 1939, entitled "Title to Submerged Lands," pages 1-2.

[9]Hearings before the Committee on Public Lands and Surveys, United States Senate, 76th Congress, 1st Session, on S. J. Res. 83 and S. J. Res. 92, *supra*, page 22. The need for this declaration of policy by Congress is reiterated throughout the Committee hearings reported on S. J. Res. 83 and S. J. Res. 92, particularly Transcript, pp. 26, 27, 29, 30, 31, 37, 44, 57, 65, 71, 74, 89, 125 and 430.

Transcript of hearings before Committee on the Judiciary, House of Representatives, 75th Congress, 3rd Session, on S. J. Res. 208, held February 23, 24 and 25, 1938, pages 44, 45, 46, 47, 50, 58, 61-66.

of policy in behalf of the people is lodged *exclusively in Congress. Neither the executive nor the judicial branches of our Government may legally or properly assert such right, declare such policy or take authoritative action in the premises in the absence of a positive pronouncement by the Congress."*[10]

There is a sound reason why a joint resolution or other appropriate action of Congress was necessary as a condition precedent to the institution of this proceeding by the Attorney General. Article IV, Sec. 3, of the Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States." Hence, Congress is the only branch of the Government having the policy-making power concerning territory or property of the United States or which the United States may desire to claim. With Congress having an established policy against asserting ownership to the submerged lands in the marginal sea or in the so-called "inland waters", it seems clear that no other branch of the Government has the power to reverse that Congressional policy and to undertake the establishment of a new policy with respect thereto.

We submit, therefore, that the Attorney General has no authority to bring or maintain this proceeding. This being the case, like any other proceeding filed by counsel having no authority to do so, the suit should be dismissed whenever that fact is shown to exist.[11]

---

[10] *Supra,* note 9.

[11] See *United States v. San Jacinto Tin Company,* 125 U. S. 273, 284 (1888), where the court by way of dictum said:

"... and in the two cases first mentioned the court violated its duty in sustaining the Government and setting aside the patents if there existed in its judgment no right in the Attorney General to institute such suits."

BLANK
PAGE

BLANK
PAGE

APPENDIX C.

English Court Decisions and Treatises.

1. The Crown's Title to the Bed of the Sea for Some Distance Below Low-water Mark Was Established by the English Common Law Authorities Prior to 1776.

In this review, we will not go back of the Sixteenth Century, but all recorded English authorities from at least as early as the Tenth Century uphold the sovereignty and dominion of the English Kings over the sea.[1]

The most important treatise in the Sixteenth Century on the ownership of submerged lands was written by Thomas Digges during the reign of Queen Elizabeth in 1568 or 1569. His treatise was entitled "Arguments Proving the Queenes Maties Propertye in the Sea Landes and Salt Shores Thereof."[2] Digges stated, in part:

> "And in this estate regall of Englande wee see that the Kings of most auncient times haue in the right of theire crowne helde the seas abowte this Ilande so proper and entire unto them . . ."[3]
>
> * * * * * * * * *
>
> "For yt is a sure Maxime in the Common Lawe that whatsoever lande there is wth in the kinges dominion whereunto no man cann justly make propertye yt is the kinges by his prerogative."[4]

---

[1]See Higgins and Colombos, *International Law of the Sea* (1943), p. 38; Fulton, *Sovereignty of the Sea* (1911), pp. 16-17; Woolrych, *Treatise on the Law of Waters and Sewers* (1st ed. 1830), 1st Am. ed. from 2d London ed., 1853, pp. 32, 47; 1 Roll. Abr. 258, l. 13; Rot. Parl. 8 Hen. 5, N. 6.

[2]Reprinted in Moore, *History and Law of the Foreshore and Sea Shore* (London, 1888), pp. 185-202; also quoted in Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926), p. 171.

[3]Digges, *op. cit. supra*, reprinted in Moore, *supra*, p. 203.

[4]*Id.* at p. 187.

The plaintiff apparently admits the existence in 1776 of the title of the English Crown to the foreshore. However, Digges treated the foreshore and marginal sea exactly alike and, in fact, used the Crown's ownership of the sea as a stepping stone in his argument for the Crown's ownership of the foreshore. *Digges first dealt with the sea,* saying that as the chief of all waters it should belong to "the cheefe the Kinge himself." He then dealt with the salt shore, citing the civil law which treated islands arising in the sea as being of the same nature, right and interest as the salt shore, and citing Bracton to the effect that such islands belonged to the King, from which Digges reasoned that the salt shore should likewise belong to the King. He concluded that the King owned the property in the sea and its shore "not only from the lowe watermarck downward but also upwarde to the full sea, . . ."[5]

At about the same time, other English writers supported the doctrine that the dominion and ownership of the seas adjoining the coasts was vested in the King. These included Thomas Craig[6] and William Welwood,[7] both English lawyers, and Gerard Malynes,[8] a merchant and writer on economics.

---

[5]*Id.* at pp. 185, 187, 191-192.

[6]See Fenn, *supra,* pp. 172-173; Fulton, *supra,* p. 357. Fenn says that Craig is the first British lawyer to make the general statement that a sovereign is the proprietor of the fisheries found in his waters. Craig lived 1538-1608.

[7]Welwood, *An Abridgment of the Sea Lawes* (London, 1636), p. 188.9; quoted in Fenn, *supra,* pp. 174-175. See Reisenfeld, *Protection of Coastal Fisheries Under International Law* (1942), pp. 9-12; Fulton, *supra,* p. 352. Welwood's treatise, first published in 1590, is said to be the earliest legal work on maritime jurisprudence printed in England.

[8]Malynes, *Consuetudo: vel, Lex Mercatoria* (London, 1656), pp. 130-134; Fenn, *supra,* pp. 177-178; Fulton, *supra,* p. 358. Malynes lived 1586-1641.

In 1610 in *The Case of The Royal Fishery of the River Banne,* Dav. 55, 80 Eng. Rep. 540, the Privy Council, in determining the ownership of a fishery in a tidal river, *relied upon the Crown's ownership of the bed of the sea as the basis for holding that the King owned the beds of navigable rivers* so far as they partook of the nature of the sea by being subject to the ebb and flow of the tide, saying:

> "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; 22 Ass. p. 93, 8 Ed. 2, Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2, Fitz. Protect. 46. *The sea is of the ligeance of the king as of his Crown of England*;) but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226, b. 22 Ass. p. 93 . . . And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath *in alto mari,* is manifest by several authorities and records."[9]

This is a decision of England's highest court.

In his lectures on the Statute of Sewers delivered at Gray's Inn in 1622, Serjeant Robert Callis stated that by the common law of England the seas around the British

---

[9] *The Case of the Royal Fishery of the River Banne* (1610), Dav. 55, 80 Eng. Rep. 540, translated in Angell, *The Right of Property in Tide Waters* (1826), pp. 37-38. The italics are those of the court.

Isles, together with the shores, belonged in property to the King.[10] Callis stated in part:

> "First, touching our *Mare Anglicum,* . . . the King hath therein these powers and properties, *videlicet,*—
>
> 1. Imperium Regale.
> 2. Potestatem legalem.
> 3. Proprietatem tam soli quam aquae.
> 4. Possessionem et profituum tam reale quam personale.
>
> And all these he hath by the common laws of England. In the 6th of *Richard* the Second, *Fitz. Prot.* 46. it is said, *That the sea is within the legiance of the King, as of his Crown of* England; this proves that on the seas the King hath *dominationem et imperium ut Rex Angliae,* and this by the common law of *England.*" (pp. 45-46.).
>
> * * * * * * * *
>
> "So I take it I have proved the King full lord and owner of the seas, and that the seas be within the realm of England; and that I have also proved it by ancient books and authorities of the law, and by charters, statutes, customs, and prescriptions, that the government therein is by the common laws of this realm . . . But the King hath neither the property of the sea nor the real and personal profits there

---

[10]Robert Callis, *The Reading Upon the Statute of Sewers* (4th ed. 1824); Fenn, *supra,* pp. 178-179. Callis has been accepted as a real authority by the judges of England. Best, J., in *Blundell v. Catterall* (1821), 5 B. & Ald. 268, 106 Eng. Rep. 1190, at 1195, stated: "* * * Callis quotes it [a passage from Bracton] as English law, and I have often heard Lord Kenyon speak with great respect of that writer [Callis]."

> arising, but by the common laws of England, . . . for no law gives the King any soil but only the common laws of England." (pp. 48-49.)

Lord Edward Coke in the early Seventeenth Century expressed the doctrine of the King's ownership of the sea in his *Institutes*,[11] as follows:

> "Now for the great prerogative and interest that the King of England hath in the Seas of England, and for the antiquity of the Court of the Admiralty of England, and of the name of the Admiral,"[12]

Coke then quotes a document which he had found in the Tower of London and which he said was made "long before the reign of E. III. in whose dayes some have dreamed it began," containing an account of a cause in or about the twenty-second year of Edward I, the important words being:

> ". . . that as the kings of England, by reason of said Kingdom have since time immemorial been in peaceful possession of the sovereign Lordship of the sea of England and of the islands situate therein . . ."[13]

---

[11]Lord Coke lived 1552-1634. Fenn, *supra*, p. 180, note 2. Fulton, *supra*, p. 363, gives 1628 as the date of publication of Coke's *First Institute*.

[12]Coke, *The Fourth Part of the Institutes of the Lawes of England* (4th ed., London, 1669), pp. 140-142 (first published in 1644); see Fenn, *supra*, pp. 180-181.

[13]Coke, *supra*, p. 142. See Fenn, *supra*, pp. 362-363; Fulton, *supra*, pp. 362-363. The untranslated text is: "que come les roys d'Engliterre per raison due dit Royalme du temps dont il ny ad memoire du contrarie eussent este en paiceable possession de la soveraigne Seignurie de la mer d'Engliterre et des Isle isteants en ycele."

In 1635 Selden's *Mare Clausum* was published. Whereas Digges' treatise and Callis' lectures had dealt entirely with the common law of England as an internal matter, Selden's work was primarily a political document presenting an international argument in answer to the contentions in Grotius' *Mare Liberum*, which had been published in 1609. Selden's work was sponsored by and dedicated to Charles I of England, and it forcefully presented the case for the sovereignty of the English Crown in the British seas. It was based upon facts and arguments gathered from extensive research in the ancient records of the realm, and it partially defined the English seas as "that which flows between England and the opposite shores and ports."[14] Although primarily a political work, Selden's *Mare Clausum* became in effect a law book in England, and copies were ordered by Charles I to be kept permanently in the Court of Exchequer and in the Court of Admiralty.[15]

Similar arguments in support of the King's exclusive property in and sovereignty over the surrounding seas were set forth in 1633 by Sir John Boroughs, the Keeper of His Majesty's Records at the Tower, in his treatise *The Sovereignty of the British Seas,*[16] and in 1661 by John Godolphin in his *A View of the Admiral Jurisdiction.*[17]

In 1646 the King's Bench Division decided the case of *Johnson v. Barret*, Aleyn 10, 82 Eng. Rep. 887, in which

---

[14]Fulton, *supra*, p. 19.

[15]*Id.* at pp. 369-374.

[16]Boroughs, *The Sovereignty of the British Seas* (Wade's ed., Edinburgh, 1920), p. 43. See Fenn, *supra*, pp. 182-183; Fulton, *supra*, pp. 364-366.

[17]See Fenn, *supra*, pp. 197-198.

it was agreed that submerged lands below low-water mark were owned by the King. The entire report is as follows:

> "In an action of trespass for carrying away soil and timber, &c. Upon trial at the Bar the question arose upon a key that was erected in Yarmouth, and destroyed by the bailiffs and burgesses of the town; and Rolle said, that if it were erected between the high-water mark and low-water mark then it belonged to him that had the land adjoyning. But Hale did earnestly affirm the contrary, viz.: that it belonged to the King of common right. *But it was clearly agreed, that if it were erected beneath the low-water mark, then it belonged to the King.* It was likewise agreed that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease, whereupon the lessee might maintain an *ejectione firmae.*"[18]

About the year 1667 Lord Chief Justice Hale wrote his famous treatise *De Jure Maris.*[19] Lord Hale wrote of the common law of England in its municipal or internal sense. He made no attempt to define the exterior boundaries of the so-called Sea of England, and thus his views can hardly be said to be "extravagant" as they are termed by counsel for plaintiff. (Br. p. 112.) However, Hale

---

[18]Plaintiff's Br. p. 113, note 69, mentions *Johnson v. Barret* as a case in point but erroneously gives it the date of 1681. The case was decided in 1646, the twenty-second year of the reign of Charles I. Indeed, Hale was counsel in this case, and he went on the bench in 1654 and died in 1676. See Plucknett, *Concise History of the Common Law* (1929), p. 205.

[19]The authorship of *De Jure Maris,* sometimes questioned, has been put beyond doubt. See Moore, *supra,* pp. 318, 370, 413; see also Mr. Justice Gray in *Shively v. Bowlby,* 152 U. S. 1 at 11 (1894).

did consider Selden's work to have satisfactorily established the King's sovereignty over the seas, and he said that the King had both jurisdiction over and property in the narrow sea adjoining the coast of England. Lord Hale said:

> "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not.
>
> "This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum;* and therefore I shall say nothing therein, but refer the reader thither.
>
> "In this sea the king of England hath a double right, viz, a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with."[20]

The subservience of the King's *jus privatum* in submerged lands to the public rights which the King had no power to destroy, was expressed by Lord Hale as follows:

> "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty."

---

[20]Hale, *De Jure Maris* (Manuscript, circa 1667), reprinted in Moore, *supra,* pp. 370 *et seq.*

Lord Hale cited many early authorities in support of his statements and sought to portray the common law of England as it existed at the time of his writing. He has since become recognized as the primary authority in the law of England upon the ownership of submerged lands.[21]

Chief Justice Rolle in his *Abridgment,* first published in 1668, said:

> "So if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; *for the English sea and channels belong to the king; and he hath a property in the soil,* having never distributed them out to his subjects."[22]

The doctrine that the Crown's right of property, subject to the public rights, extended only to the furthest reach of the tide was followed in *Bulstrode v. Hall & Stephens,* 1 Sid. 148, 82 Eng. Rep. 1024 (1674), where it was said:

> ". . . the bed of all rivers as high as there is flux and reflux of the Sea, is in the King and not in the Lords of the Manors etc., except by prescription."[23]

In 1676, Molloy wrote a book on the maritime law of England,[24] in which he sturdily proclaimed the King's ownership of the sea.

---

[21]See *Shively v. Bowlby,* 152 U. S. 1 at 11 (1894). See Brief, pp. 21-26, for United States cases relying upon Lord Hale as such an authority.

[22]2 Roll. Abr. 170.

[23]The untranslated text is: "* * * le soil de touts rivers cy haut que la est fluxum & refluxum maris est in le Roy & nemy in les seigneurs de mannors &c. sans prescription."

[24]*De Jure Maritimo et Navali, or A Treatise of Affaires Maritime and of Commerce* (London, 1676.) Later editions were published in 1682, 1690, 1744, 1769, etc. For a long time it was considered the standard work on the maritime law of England. See Fulton, *supra,* p. 514.

In 1689, Sir Phillip Meadows asserted the King's ownership of the adjoining sea but argued for reducing the scope of the claims of ownership, saying that all agreed that a nation was entitled to some marginal sea, but that there was variance as to how much.[25]

In 1700, Alexander Justice, in his *General Treatise of the Dominion of the Sea*, likewise supported the sovereignty, dominion and propriety of the British Crown in the seas surrounding the Island.

The uniformity of treatment of the sea and navigable rivers so far as the tide ebbs and flows, both as respects the public right of fishing and the Crown's ownership, is shown in *Warren v. Matthews*, 6 Mod. 73, 87 Eng. Rep. 831 (1704), where the court said:

> "*Per Curiam.* Every subject of common right may fish with lawful nets, &c. in a *navigable river*, as well as in *the sea*, and *the King's grant* cannot bar them thereof; . . ."

Matthew Bacon in his *New Abridgment of the Law*, first published in 1736, said:

> "It is universally agreed, that the king hath the sovereign dominion in all seas and great rivers; which is plain from Selden's account of the ancient Saxons, who dealt very successfully in all naval affairs, and

---

[25]Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas* (1689), quoted in Riesenfeld, *supra*, p. 20, note 80. See Fulton, *supra*, p. 525. Parker, Chief Baron of the Exchequer, wrote in 1774: "Sir Philip Medow's rules for ascertaining the limits of the sea, seem to be founded on more solid and prudential reasons, than Mr. Selden has offered, in his book." Hargrave and Butler's *Coke on Littleton* (1853), p. 261a.

therefore the territories of the English seas and rivers always resided in the king."[26]

And in *Carter v. Murcot,* 4 Burr. 2162, 98 Eng. Rep. 127 (1768), it was held by Lord Mansfield that navigable rivers and arms of the sea belong to the Crown and that the right of fishing therein is *prima facie* common and public.

The last two English writers to deal with the subject prior to 1776 were two of the most distinguished authorities in English legal history. Sir John Comyns in 1762 wrote his *Digest of the Laws of England,* in which he stated:

> "The king has the property *tam aquae quam soli,* and all profits in the sea, and all navigable rivers. Cal. 17. Dav. 56, 57.
>
> * * * * * * *
>
> "And every arm of the sea, or navigable river so high as the sea flows and reflows, belongs to the king, and he has the same property therein as *in alto mari.* Dav. 56. 2 Rol. 170, 1. 20."[27]

Sir William Blackstone in 1765 recognized the King's ownership of lands under the sea, saying:

> "* * * But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, *as the king is lord of the sea, and sole owner of the soil while it is covered with water,* it

---

[26]Bacon, *A New Abridgment of the Law* (Bouvier's ed., Philadelphia, 1869), vol. 8, p. 18.

[27]Comyns, *Digest of the Laws of England* (First Amer. ed. from fifth London ed., 1825), pp. 166, 167 [pp. *152, *153].

is but reasonable he should have the soil, when the water has left it dry."[28]

The above review of the English cases and treatises prior to 1776 demonstrates that the Crown of England has, since long prior to 1776, been recognized under the common law as the owner of the bed of the sea for some distance seaward from low-water mark around the coasts of England, as well as of the foreshore and the arms of the sea and rivers to the extent that they are subject to the ebb and flow of the tide, the Crown's title to all this land being subject to the public rights of navigation and fishing (*jus publicum*).[29]

2. The English Common Law Authorities After 1776 Confirm the Crown's Title to the Bed of the Marginal Sea.

After 1776 neither the English courts nor the English text writers departed from the basic principles laid down by Callis and Hale as to the Crown's ownership, subject always to the public rights of navigation and fishing, of the bed of the sea, of arms of the sea and navigable rivers so far as the tide flows and reflows, and of the foreshore bordering on such waters. With the development of the cannon-shot rule in international law, which began to be

---

[28]2 *Blackstone's Commentaries* (1765), p. 262. "The *Commentaries* had a tremendous sale in this country . . . served as the principal means of the colonists' information as to the state of the English law." Plucknett, *Concise History of the Common Law* (1929), p. 207.

[29]While the case law on the subject prior to 1776 is not voluminous, the implication of the comment in the plaintiff's brief, (p. 113, note 69) that "a few very early cases" contained references to Hale's views or those of Selden, is entirely unjustified, the important point being that each and all of the decided cases during the period coincided precisely with the principles laid down by Lord Hale in *De Jure Maris*, and there was no decision to the contrary.

recognized by the English Admiralty Courts by 1760,[30] the common law cases began to place the outer limit of the Crown's ownership of the sea bed at the distance of a cannon-shot or three miles from low-water mark. But that international law doctrine had no effect whatever upon the internal common law of England as to the ownership of the submerged lands within that limit.

(a) The Cases.

The continuity in the common law from the Sixteenth Century to the Twentieth is perfectly demonstrated by the application, in 1916, of the principles announced by Hale and Callis to the question of the ownership of the bed of the open sea near the coast of India. In the case of *Secretary of State for India v. Chelikani Rama Rao,* 43 L. R. Ind. App. 192 (1916), (a case which is given only the most cursory mention by counsel for the plaintiff),[31] the Judicial Committee of the Privy Council, the highest court in the British Empire for the determination of questions arising in the dominions and colonies, held squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British

---

[30]In 1760, the High Court of Admiralty in England decided that a captured French vessel was not good prize because taken within a port of the King of Spain "within reach of his cannon." *The De Fortuyn* (1760), *Marsden's Admiralty Cases,* p. 175. And see *The Twee Gebroeders,* 3 C. Rob. 162, 165 Eng. Rep. 422 (1800), where it was held that the capture of Dutch ships by an English ship effected within three miles of the Prussian coast, Prussia being neutral, was made within the limits to which neutral immunity was conceded; *The Anna,* 5 C. Rob. 373, 165 Eng. Rep. 809 (1805), where it was held that a capture made by a British ship within three miles of certain mud islands off the mouth of the Mississippi River was made within the boundaries of the United States, a neutral nation. (It is to be noted that the coast at that point was then a part of the Louisiana Territory, the State of Louisiana not yet having been admitted into the Union.)

[31]Plaintiff's Br. pp. 45, 50, 115.

Crown. In delivering the unanimous judgment of the court, Lord Shaw of Dunfermline said (pp. 189-199):

> "Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, 'De Jure Maris.' He describes how 'the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, viz.:—
>
> '1. Increase *per projectionem vel alluvionem.*
>
> '2. Increase *per relictionem vel desertionem.*
>
> '3. *Per insulae productionem.*'
>
> "The lands in dispute fall under the third category, which is thus dealt with by Hale:—
>
> "'3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water'."

It is plain that the court did not consider that it was applying any new doctrine based upon any recently developed rules of international law, for not only did the court rely upon Lord Hale but it also stated (p. 199):

> "The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of

the water. *At what date soever they appeared,* they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

"The case is not complicated by any point as to geographical situation, or by the question whether a limit from the shore seawards should be beyond three miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terrae*—no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have arisen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown."

No clearer answer to the contentions of the plaintiff in this case could be formulated.

The common law principles relied on by Lord Shaw in the *Secretary of State for India* case were repeatedly applied and confirmed by the English courts between 1776 and 1916.

The first case dealing with the subject that arose after 1776 was *Blundell v. Catterall,* 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821). All four of the judges who wrote opinions relied upon the authority of Lord Hale, with respect not only to the ownership of submerged lands by the Crown but also to the public trusts to which that ownership is subject. Holroyd, J., said in his opinion:

". . . as he [Hale] also there lays it down, in the main sea itself, adjacent to his dominions, the

> King only hath the propriety, but a subject hath not . . .
>
> * * * * * * * *
>
> "By the common law, though the shore, that is to say the soil betwixt the ordinary flux and reflux of the tide, *as well as the sea itself, belongs to the King;* yet it is true that the same are also *prima facie publici juris,* or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right in all the King's subjects, of navigation for the purposes of commerce, trade, and intercourse; and also the liberty of fishing in the sea or the creeks or arms thereof . . ." (106 Eng. Rep. at 1199.)

Here it will be seen that the English court was not announcing any new doctrine but was simply applying the settled common law on the authority of Lord Hale. The fact that there were no court decisions between 1768 (*Carter v. Murcot, supra*) and this case did not mean that there was a hiatus in the law during that period.

In *Rex v. Lord Yarborough,* 3 B. & C. 91, 5 Bing 163, 1 Eng. Rul. Cas. 458 (1828), the old principles of Callis and Hale were reaffirmed by Best, C. J., speaking the unanimous opinion of the eleven judges who heard the case in the House of Lords, as follows:

> "All the writers on the law of England agree in this: that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him." (1 Eng. Rul. Cas. at 471.)

In 1829 in the case of *Benest v. Pipon,* 1 Knapp 60, 12 Eng. Rep. 243, the Privy Council considered the property right to cut sea-weed (vraic) growing on the rocks called "L'Isle Percee" which were located in a bay on the Isle of Jersey. Lord Wynford, speaking for the court, said (12 Eng. Rep. at 246-247):

> *"The sea is the property of the King, and so is the land beneath it,* except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusively used for so long a time as to confer on him a title by prescription: . . . This is the law of England and the cases referred to prove that it is the law of Jersey. . . . This rule of law is derived from a universal principle of convenience and justice. *What never has had an individual owner belongs to the Sovereign within whose territory it is situated.* . . .
>
> "The Islands of Jersey and Guernsey were parts of the duchy of Normandy. The laws of Normandy were introduced into this kingdom by William the First, and superseded the Saxon laws, which before that period were the laws of England. This circumstance accounts for the laws of England and Jersey being precisely the same with regard to *land that is below the ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King."*

This decision conclusively negatives plaintiff's theory that property rights in the marginal sea "emerged" under international law after 1776. Such rights have existed in the sovereign continuously since 1066.

In *Attorney-General v. Chambers*, 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854), the Attorney General filed an information against the owners and lessees of a certain district abutting on the seashore in the County of Carmathen, alleging that by royal prerogative, all mines and minerals lying under the sea, seashore and arms of the sea, belonged and had at all times belonged to the Kings and Queens of England. The Court's decision was premised upon the following statement of Mr. Baron Alderson (43 Eng. Rep. at 489):

> "The Crown is clearly in such a case, according to all the authorities, entitled to the 'littus maris' *as well as to the soil of the sea itself adjoining the coasts of England.*"

In *Attorney-General v. Hanmer*, 4 Jur. N. S. 751 (1858), a case in Vice-Chancellor Stuart's Court involving the construction of a royal grant of coal mines, Mr. Baron Watson, speaking for the court, relied on Lord Hale as follows (p. 753):

> "Lord Hale says that the main sea is the waste and demesne of the kings of England, and the king is the owner of that great waste the sea."

In 1858 an arbitration proceeding was conducted to determine the respective property rights of the Queen of England and the Prince of Wales, who was also Duke of Cornwall, in minerals lying under the seashore of the Duchy of Cornwall both above and below low water-mark.[22] The arbitrator, Sir John Patteson, decided that the right to all mines and minerals lying below low water-

---

[22]See Plaintiff's Br. pp. 45-47.

mark under the open sea adjacent to the County of Cornwall was vested in the Queen, although the Duke was in fact the first occupier of those mines and it was contended for the Duke that he owned them as first occupier. The argument for the Queen, however, was founded on the proposition that the bed of the sea below low water-mark belonged in property to the Crown,[33] and such was the decision of the arbitrator. The arbitrator's decision was confirmed and ratified by Parliament in the Cornwall Submarine Mines Act, 1858, 21-22 Vict., Ch. 109, which declared that the mines and minerals lying below-water mark under the open sea were vested in the Queen in right of her Crown *"as part of the soil and territorial possessions of the Crown."* In the words of Lord Chief Justice Coleridge, "Parliament did but apply . . . that which is and always has been the law of this country."[34]

In *Gammell v. Her Majesty's Commissioners of Woods and Forests,* 3 Macqueen's Appeals 419 (1859), the

---

[33]See opinion of Lord Coleridge, C. J. in *The Queen v. Keyn,* L. R. 2 Exch. Div. 63 at 155-158 (1876). Lord Chancellor Cranworth was counsel for the Crown in this arbitration, having then recently participated in the decision in *Attorney-General v. Chambers, supra.* Callis, Selden, Hale and other common law authorities reviewed above were presented to the arbitrator, Sir John Patteson, and in his award he stated that he had reviewed them carefully in formulating his conclusions. Copies of the submission, briefs and award in the Cornwall Mines Arbitration are lodged, concurrently herewith, with the Clerk for the convenience of the Court.

[34]In *The Queen v. Keyn,* L. R. 2 Exch. Div. 63, at 158 (1876).

House of Lords held that the salmon fisheries in the open sea around the coast of Scotland, unless parted with by grant, belonged exclusively to the Crown and formed part of its hereditary revenue. In speaking of the limits of the fisheries in question, Lord Wensleydale said (pp. 465-466):

> "* * * it would be hardly possible to extend it seaward beyond the distance of three miles, which by the acknowledged law of nations, belongs to the coast of the country, that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession."

In *The Free Fishers and Dredgers of Whitstable v. Gann,* 20 C. B. (N. S.) 1, 144 Eng. Rep. 1003 (1865), Lord Chelmsford in the House of Lords quoted with approval the following statement of Lord Chief Justice Erle of the Common Pleas in his opinion on the case in the lower court (144 Eng. Rep. at 1011-1012):

> "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown * * *."

In *Ipswich Dock Commissioners v. Overseers of the Parish of St. Peter, Ipswich,* 7 B. & S. 310 (1866), the Exchequer Chamber through Blackburn, J., said (p. 344):

> "In *Reg. v. Musson* it was rightly decided that what Lord Hale calls the main sea is *prima facie* extra-parochial, and in the absence of evidence that it forms part of a parish it must be taken that it does not; and the same reason, that it is part of the waste and demesnes and dominions of the Crown,

would apply to an estuary or arm of the sea; it is a part of the great waste, both land and water, of which the king is lord."

In *Murphy v. Ryan*, Ir. R. 2 C. L. 143 (1868), the court said through O'Hagan, J. (p. 149):

> "But whilst the right of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the Crown—*the soil of the sea, and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public.*"

In *Lord Advocate v. Trustees of the Clyde Navigation*, 19 Rettie 174 (1891), the Court of Session of Scotland held through Lord Kyllachy (p. 177):

> "* * * there is *no distinction* in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, *and in the bed of the sea within three miles of the shore.* In each case it is of course a right largely qualified by public use. * * * but nonetheless is it, in my opinion, a proprietary right * * *."

In the same case, Lord Young said (p. 183):

> "* * * I have no objection to indicate my own view * * * that the Crown has a right of property within the three mile limit."

Again the three mile doctrine shows its influence, but only as a seaward boundary for rights already well established and unaltered in quality.

In *Lord Advocate v. Weymss,* 1900 A. C. 48 (1899), the House of Lords, through Lord Watson, said (p. 66):

> "I see no reason to doubt that, by the law of Scotland, the solum underlying the water of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown * * *."[35]

In *Lord Fitzhardinge v. Purcell* (1908), 2 Ch. 139, the court treated tidal rivers and the bed of the sea alike. Parker, J. said (p. 166):

> *"Clearly the bed of the sea, at any rate for some distance below low-water mark,* and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership."[36]

---

[35]Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao,* 43 L. R. Ind. App. 192 (1916), discussed *supra,* pp. 51-53. Lord Shaw said of the *Wemyss* case (p. 201): "The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question, not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part."

[36]Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao,* 43 L. R. Ind. App. 192 (1916), discussed *supra,* pp. 51-53. Lord Shaw said of this case (p. 200): "It is true that the case cited dealt merely with the right of fowling, but it was necessary in the determination of that right to settle the true nature of the right in the land itself."

During the period since 1776 the English cases have followed Digges' principle that the Crown *prima facie* owns the foreshore between the high- and low-water marks, subject to the public right of navigation and fishing.[37] It is clear that the development of the Crown's right to the foreshore, which plaintiff apparently concedes to have been established in 1776, did not precede the establishment of the Crown's right to the bed of the sea. On the contrary, the establishment of the Crown's *prima facie* right to the foreshore under Digges' doctrine was developed from the earlier doctrine of the Crown's ownership of the bed of the sea.

(b) Treatises.

The doctrine of the common law cases cited above is likewise reflected in treatises on the English common law written since 1776. Henry Schultes in his *Essay on Aquatic Rights* (London, 1811), stated the law to be substantially as laid down by Lord Hale more than a century before him. Schultes said (pp. 109-110):

> "By the common law, the king hath the sovereign dominion over the sea adjoining the coasts, and over the navigable rivers; and hath also the right of property in the soil thereof, and is consequently entitled to all *maritima incrementa*. But the crown has

---

[37]Cases dealing with the ownership of the foreshore are *Attorney-General v. Richards*, 2 Anst. 603, 145 Eng. Rep. 980 (1794); *Attorney-General v. Parmeter*, 10 Price 378, 147 Eng. Rep. 345 (1811); *Attorney-General v. Johnson*, 2 Wilson Ch. 87, 37 Eng. *Rep.* 240 (1819); *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821); *Smith v. Earl of Stair*, 6 Bell App. Cas. 487 (House of Lords, 1849); *Attorney-General v. Chambers*, 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854); *The Queen v. Musson*, 8 El. & Bl. 899, 120 Eng. Rep. 336 (1858); and *Attorney-General v. Emerson*, L. R. [1891] A. C. 649.

> not an exclusive right of fishery, nor can it grant an exclusive right to another . . . The sea and navigable streams are public for all the king's subjects to fish indiscriminately, without interruption of common right."

Chitty[38] in his *Prerogatives of the Crown* (London, 1820), stated (p. 173):

> "Under this head it may also be mentioned, that the King possesses the *sovereign dominion* in all the narrow seas, that is, the seas which adjoin the coasts of England, and other seas within his dominions. This prerogative power is vested in the King, as the protector of his people, and guardian of their rights. It is subservient, however, to those *jura communia*, which nature and the principles of the constitution reserve for his Majesty's subjects. It can neither prevent them from trading or fishing."

Joseph K. Angell, in his *The Right of Property in Tide Waters*, published in 1826 (an American work which is mentioned here because it deals largely with the common law of England), said (pp. 17-18):

> "In this respect, it will appear, that the Roman law has been very much surpassed, by the common law of England. For although, as will presently be shewn, the sea, &c. according to the provisions of the common law, are as public and common, as they were among the Romans; yet it is not only the policy of the common law to assign to every thing capable of occupancy and susceptible of ownership a legal and certain proprietor—but also to make those things

---

[38]Chitty was one of the most famous editors of *Blackstone's Commentaries*.

which from their nature cannot be *exclusively* occupied and enjoyed, the property of the *sovereign*.

* * * * * * * *

"To the king, therefore, is not only assigned the sovereign dominion over the sea adjoining the coasts, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof*."[39]

In short, such ownership is an "*incident of sovereignty*."

Hall, in his essay on *The Rights of the Crown in the Sea-Shores of the Realm*,[40] first published in 1830, emphasized the idea that the Crown's ownership of the beds of inland navigable waters was derived from the Crown's ownership of the sea, saying:

"This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports and tiderivers,* as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea, itself, and subject, in all respects, to the like ownership."[41]

Woolrych in his *Treatise on the Law of Waters and Sewers,* first published in 1830, based the King's original title to the beds of the sea adjoining the coast and of navigable rivers upon the common law principle that all the soil of the realm was originally vested in the King as lord paramount and universal occupant, and he traced

---

[39]Italics are those of the author.

[40]3rd ed., reprinted in Moore, *supra*, pp. 667-892. See quotation from Hall, Brief, pp. 20-21.

[41]*Id.* at p. 669. Italics are those of the author.

the King's ownership of the foreshore and the beds of navigable rivers to their similarity to the sea within the tidal flow.[42]

Among the other writers who similarly stated the law of the ownership of the bed of the sea and of navigable rivers are Bainbridge in 1841,[43] Jerwood in 1850,[44] Rogers in 1864,[45] Macswinney in 1884, [46] and Moore in 1888.[47]

Sir Cecil J. B. Hurst, President of the Permanent Court of International Justice, writing in 1923, said:

> "So far as the law of this country is concerned, the rights of the Crown were fixed long before the doctrine of the three-mile limit was thought of, and yet it seems to be agreed that nowadays these property rights do not in general extend beyond the three-mile limit."[48]

The cases and treatises cited above covering the period from 1776 to the present day all proceed on the basis of the same common law rules as those announced by Callis

---

[42]Woolrych, *Treatise on the Law of Waters and Sewers* (1st Am. ed. from 2d London ed., 1853), pp. 47, 52, 394-399.

[43]*Bainbridge on Mines and Minerals* (1st ed. London, 1841), see 1st Am. ed., 1871, from 3d London ed., p. 13.

[44]Jerwood, James, *A Dissertation on the Rights to the Sea Shores* (London, 1850), pp. 13, 40-41, 43-45.

[45]*Rogers on Mines* (1st ed. London, 1864), see 2d ed., 1876, pp. 178 *et seq.*

[46]*Macswinney on Mines* (1st ed. London, 1884), see 5th ed., 1922, p. 33.

[47]Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (1888), p. 653.

[48]Hurst, Sir Cecil J. B., "Whose Is the Bed of the Sea?," 4 *British Year Book of International Law,* 1923, p. 34.

and Hale in the Seventeenth Century. They indicate no change whatsoever in the common law after 1776 by which the Crown acquired any rights in the bed of the sea *which it did not have prior to 1776.*

(c) The Dicta in The Queen v. Keyn.

Statements of some of the judges in the case of *The Queen v. Keyn,* L. R. 2 Exch. Div. 63 (1876), are relied upon by the Attorney General as the primary support for his contention that the English Crown in 1776 had no title to the bed of the marginal sea which could be transmitted to the original thirteen States. The statements relied upon not only constituted pure *obiter dictum,* but they are entirely out of line with the earlier and later English authorities cited above. They have, therefore, been reserved for special treatment.

The issue before the court in the *Keyn* case did not require a decision on the territorial limits of England, as plaintiff's counsel admit (Br. p. 47). The sole question there presented was whether the Central Criminal Court of England had jurisdiction to try a *foreigner* for a crime, as defined by English law, which was committed on board a *foreign ship* sailing within three miles of the English coast. The decision was that prior to the statute of 28 Hen. VIII, c. 15, the jurisdicton of the Lord High Admiral did not extend to a crime committed by a foreigner on board a foreign ship, either within or without the limit of three miles from the English coast; that by virtue of that and subsequent statutes, the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral; and hence, *in the absence of a statute* extending its jurisdiction, the Central Criminal Court had no

jurisdiction in the case at bar. It is clear that no question of title to submerged lands was involved.[49]

The case was heard before thirteen judges, seven of whom held that there was no jurisdiction and six of whom were of the opinion that jurisdiction existed. Of the seven judges comprising the majority of the court, only five (Cockburn, C. J., Kelly, C. B., Field, J., Pollock, B., and Sir Robert Phillimore) expressed any doubt that the marginal sea, at least to the extent of three miles from the coast, constituted English territorial waters in the sense necessary to give the court jurisdiction without an Act of Parliament.

This doubt was based upon the fact that in England the "body of the counties," to which the jurisdiction of the common law courts was limited, did not extend below low-water mark, and upon the dual meaning of the word "realm" in English law. In this connection Chief Justice Cockburn said (L. R. 2 Exch. Div. at 197-198):

> "To come back to the subject of the realm, I cannot help thinking that some confusion arises from the term 'realm' being used in more than one sense. Sometimes it is used, as in the statute of Richard II, to mean *the land of England,* and the internal sea with-

---

[49]The statement in plaintiff's brief (p. 113) that the opinion of Cockburn, C. J. in the *Keyn* case "is perhaps the most exhaustive English judicial opinion *on the question*" is incorrect. The opinion is not "on the question" of ownership of the bed of the sea but of criminal jurisdiction in admiralty over a foreigner. Perhaps the most exhaustive English judicial opinion on the question of the Crown's ownership is that in the case of *Secretary of State for India v. Chelikani Rama Rao, supra.* The most exhaustive judicial opinion on the same question in America is this Court's opinion in *Shively v. Bowlby,* 152 U. S. 1. Yet plaintiff would have this Court disregard these decisions (Br. p. 113), both of which deal with the subject here under consideration, in favor of the over-ruled *dictum* of the *Keyn* case.

in it, sometimes as meaning whatever the sovereignty of the Crown of England extended, or was supposed to extend, over.

"When it is used as synonymous with territory, I take the true meaning of the term 'realm of England' to be *the territory to and over which the common law of England extends*—in other words, all that is within the body of any county—to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions, into which, among other things for the administration of the law, the kingdom is parcelled out."[50]

And Chief Justice Cockburn, on whose opinion in the *Keyn* case the Attorney General relies so heavily,[51] readily admitted that Parliamentary legislation extending the criminal jurisdiction to foreigners on foreign ships within the three-mile belt would be binding on the English courts, and succinctly stated the issue before the court as follows (L. R. 2 Exch. Div. at 208):

"The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been

---

[50]The same dual meaning of the word "realm" in England was recognized by a former Justice of this Court in *De Lovio v. Boit*, 7 Fed. Cas. 418, Case No. 3776 (Circuit Court, Mass., 1815) where Mr. Justice Story said (p. 427):

"As to the dictum in 30 Hen. VI. p. 6, respecting the admiralty judges, that 'the place and things of which they hold plea, are *out of the realm,' if it means to speak of the realm in its largest sense, it will include the British seas* (Co. Litt. 259b; 1 Rolle, Abr. 528 l. 13), and is not law; if in a more narrow sense, as including only the bodies of the counties, it will be fully considered hereafter."

[51]Plaintiff's Br. pp. 47, 75, 114, 115, 118, 136, 138.

made specifically liable to our law by statutory enactment that that law can be applied to them."

The majority judges in the *Keyn* case were thus chiefly concerned with the absence of statutory jurisdiction to try a foreigner—a problem obviously unrelated to any question of rights of ownership below low-water mark as between the sovereign and his subjects or as between different political sovereigns within the same territory.

The claim that the *Keyn* case constitutes any authority in support of the plaintiff's theories in the present case, is, it is submitted, predicated on a failure to distinguish between the meaning of the word "jurisdiction" as applied to the *power of a court to enforce existing laws,* and "jurisdiction" as appled to the *power of the sovereign to enact laws* within a certain territory. Jurisdiction in the latter sense is *political jurisdiction* which is synonymous with sovereignty. The majority judges in the *Keyn* case held only that the power of the court to try a foreigner for a crime committed in the three-mile belt outside the body of the English counties could not be conferred by implication,—in other words, that jurisdiction of the court could not exist without legislation. But the power, *i. e.,* political jurisdiction, of Parliament to enact such laws was expressly conceded.

Thus even the majority decision in the *Keyn* case is not inconsistent with the Crown's ownership of the bed of the sea. And none of the factors which troubled the majority in that case exists in the case at bar. In California the entire three-mile belt is not only within the State's boundaries as defined in the California Constitution but is within the body of the California coastal counties, all of which are described by statute as extending three miles

from shore. [Appendix to Answer, pp. 83-86.] Furthermore this Court in *Manchester v. Massachusetts,* 139 U. S. 240, at 263-264 (1891), held that the body of the counties in the States of this Union need not be bounded by low-water mark by reason of the rule of the English common law, but extends to the States' boundaries, which may be lawfully fixed at three miles from shore.[52] Likewise there is definite legislation by which California has conferred upon its judicial and executive officers complete jurisdiction and power over the three-mile belt.

The lack of criminal jurisdiction over foreigners within the three-mile limit, which was held to exist in *The Queen v. Keyn,* was quickly supplied by Parliament through the passage of the Territorial Waters Jurisdic-

---

[52]In *Manchester v. Massachusetts,* Mr. Justice Blatchford said (139 U. S. at 263-264):

> "It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State."

tion Act, 1878, 41 and 42 Vict. c. 73.[53] That Act stated in its preamble:

> "Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions: * * *".

and it was thereby enacted that an offense committed by any person, whether or not a British subject, on the open sea within British territorial waters was an offense within the jurisdiction of the Admiral, although committed on board or by means of a foreign ship. The Act defined territorial waters in reference to the sea as meaning such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of the Crown, and provided that for purposes of the Act it in-

---

[53]As a result of the decision in *The Queen v. Keyn*, the Lord Chancellor (Lord Cairns) in February 1878 presented a bill in the House of Lords which was passed as the Territorial Waters Jurisdiction Act, 1878, 41 and 42 Vict. c. 73, stating that he understood the common ground on which the majority of the judges acted in quashing the conviction in the *Keyn* case to be that the jurisdiction of the Lord High Admiral extended to the high seas, but that the persons over whom it was exercised must be British subjects and not foreigners, and that the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral. Lord Cairns also pointed out that the Dover Port Authorities had, pursuant to Parliamentary authority, defined the port as extending three miles from shore and including the place of the offense in the *Keyn* case *prior to its commission*, but that through some unbelievable piece of inadvertence this fact had not been called to the attention of the judges. If it had been brought to their knowledge, he said, the decision would have been the other way. See Halleck, *International Law*, 4th ed., London, 1908 (as reprinted in Crocker, *The Extent of the Marginal Sea* (1919), p. 98).

cluded "any part of the open sea within one marine league of the coast measured from low-water mark."[54]

John Bassett Moore said of this Parliamentary action:

> "* * * the government and Parliament of Great Britain, after the decision in *Queen v. Keyn,* considered it imperative to adopt legislation nullifying its effect for the future, besides declaring it wrong as to the past."[55]

The gratuitous statements of Chief Justice Cockburn and some of his colleagues in *The Queen v. Keyn* were placed in their proper perspective, as respects the question of ownership of submerged lands, in the decision of the Privy Council in *Secretary of State for India v. Chelikani Rama Rao,* 43 L. R. Ind. App. 192 (1916). That case has heretofore been referred to (pp. 51-53) as holding squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British Crown, a decision which was grounded squarely upon the authority of Lord Hale and

---

[54]Despite this legislation, the dicta contained in the majority opinions in *The Queen v. Keyn* continued to have some influence, at least in the decision of the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada,* [1914] A. C. 153 (see Plaintiff's Br., pp. 48-50). The Privy Council stated in that case that no decision was required on the question of whether the Crown had a right of property in the bed of the sea below low-water mark, and the statements in the opinion upon which plaintiff relies were therefore pure dicta. It is of interest, however, that the Privy Council did say in that case, in answer to one of the questions certified to it from the Supreme Court of Canada, that there was no difference between the open sea within a marine league of the coast on the one hand, and arms of the sea and estuaries on the other, so far as concerned the public right of fishing, thus reaffirming and applying the common law doctrine under which the sea and arms of the sea were and are treated alike.

[55]*The Collected Papers of John Bassett Moore,* vol. VII, p. 294.

of common law cases dealing with ownership of submerged lands. Speaking for the Privy Council, Lord Shaw of Dunfermline said of *The Queen v. Keyn* (pp. 199-200):

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of *Reg. v. Keyn.* (2 Ex. D., 63). The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. *It should not be forgotten that that case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided.* It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
>
> *"When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound.* Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore."

After referring to and quoting from *Lord Fitzhardinge v. Purcell, supra,* and *Lord Advocate v. Clyde Navigation Trustees, supra,* Lord Shaw quoted as follows from

the opinion of Lord Watson in *Lord Advocate v. Weymiss* (p. 201):

> "I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it are vested in the Crown."

And Lord Shaw continued (pp. 201-202):

> "In the opinion of the Board, this is also the law of India. The Crown is the owner and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire."

Some years before the Privy Council's decision in the *Secretary of State for India* case, this Court expressed a similar view as to the weight to be given the decision in *The Queen v. Keyn*. In *Manchester v. Massachusetts*, 139 U. S. 240 (1891), Mr. Justice Blatchford said of that case (p. 257):

> "* * * there [in *The Queen v. Keyn*] the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the cases cited in the opinions delivered in *Reg. v. Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted."

(d) Summary.

The foregoing review of English common law authorities from 1569 to the present time conclusively shows:

1. That whenever the question as to the dominion or ownership of the bed of the sea within a limited distance from the open coast of England and its colonies has been in issue, the answer given by the English common law courts has invariably been that the ownership of the sea bed is in the British Crown, subject only to the public rights of navigation and fishing.

2. That there has been no change in the English common law on this subject since 1776 or 1789, all the cases having relied upon the principles laid down by Lord Hale in the Seventeenth Century.

3. That no distinction whatever has been made between the Crown's ownership of the sea bed off the open coast on the one hand and the Crown's ownership of the foreshore and the beds of so-called inland navigable waters to the extent of the flow of the tide on the other, the Crown's title in each case being subject to the public rights of navigation and fishing.

4. That the development of the three mile limit in international law has in no sense served as a basis for the emergence of any new rights of the Crown in the sea bed which it did not enjoy in and prior to 1776, and that the only and utmost effect of that doctrine has been to place a seaward boundary upon the extent of sea bed owned by the Crown.

5. That the plaintiff's contention that the English Crown in 1776 and 1789 had no title to the bed of the sea off the open coast, which could be transferred to the original thirteen States, is based solely upon doubts expressed a century later by a few English judges in *obiter dicta* which have subsequently been unequivocally overruled and repudiated both by Parliament and by the Courts.

BLANK PAGE

BLANK
PAGE

APPENDIX D.

United States v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936).

The sole question involved in this case was the validity of a joint resolution of Congress which authorized the President to prohibit the sale of arms and ammunition to certain South American countries engaged in hostilities. The case has not the remotest bearing on the question of proprietary rights in the marginal sea as between States and the Federal Government, or even as between the Federal Government and other nations. The Congress had ample authority under its constitutional power in respect of foreign affairs to adopt the resolution in question. Mr. Justice Sutherland, however, took the occasion to set forth a theory which he had previously advanced when he was a member of the United States Senate to the effect that powers of external sovereignty had passed directly from the British Crown to the incipient Union and had not first vested in the individual States.

The main argument in support of Justice Sutherland's theory was that the Congress of the Confederation had, in fact, exercised certain powers of sovereignty external in their nature. It did prosecute a war and negotiate with foreign nations. The fact that it *exercised* such powers gives some color to the theory that sovereignty was actually vested in it.

However an examination of the Articles of Confederation will show that at the time of the Treaty of Paris, in 1783, the so-called "Federal Government" was not a government at all, and possessed not an atom of true sovereignty. It was merely what Article III of the Articles

declared it to be, namely, "a firm league of friendship" between thirteen sovereign and independent States, each of which, as declared in Article II, retained "its sovereignty, freedom and independence."

The Congress of the Confederation could declare war, grant letters of marque and reprisal, negotiate treaties and alliances, coin money and regulate the value thereof, emit bills and borrow money—but *it could do none of those things except with the assent of nine of the States.* And, even after it had executed a treaty with the assent of nine States, it could not compel *any* of the States to abide thereby, and it had no authority to regulate commerce with foreign nations. It could not raise an army, nor could it levy taxes to maintain itself. It could issue "requisitions" for troops and for money, but each State might honor such requisitions, or not, as it pleased.

While each of the States agreed not to engage in a war without the consent of Congress, there was no way of enforcing that agreement. And in time of war each State could issue letters of marque and reprisal and could, and in some instances did, commission its own ships of war.

Each of the delegates in the Congress was present, not as an independent legislator, but solely as the "mouthpiece" of his State. He was paid and maintained solely by his own State, which could recall him and replace him by another at any time during the session, with or without cause. He was thus deprived of opportunity to act in accordance with his own judgment and compelled to follow his instructions at all times. His status approximated most closely that of an ambassador.

Mr. Randolph pointed this out at the Philadelphia Convention when he said, speaking of the delegates in the Continental Congress:

> "They have therefore no will of their own, they are a mere diplomatic body, and are always obsequious to the views of the state, . . ." (3 *Documentary History of the Constitution,* p. 137.)

In short, "the United States in Congress assembled" was no more of a government in 1783 than was the Congress of Vienna in 1814-1815, or the League of Nations following World War I, or the United Nations at the present time. To say that the Congress of the Confederation possessed external sovereignty, is to deny the uncontrovertible facts. As Mr. Justice Wilson pointed out in *Chisholm v. Georgia,* 2 Dall. at 463 (1793):

> "To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its *Legislative* authority: *Executive* or Judicial authority it had none."

The above shows clearly that the Confederation exercised powers of sovereign character only in the capacity of an agent and with the "acquiescence of the States" and, hence, it was not sovereign in a legal sense. This is illustrated by the early case of *Penhallow v. Doane,* 3 Dall. 54, a case relied on in the *Curtiss-Wright* case. A careful reading of that case will show that it does not support Mr. Justice Sutherland's dictum. The decision of Justice Iredell in the *Penhallow* case states (p. 91) that prior to the ratification of the Articles of Confederation the Continental Congress

> "did exercise, *with the acquiescence of the states,* high powers of what I may, perhaps, with propriety, for distinction, call external sovereignty, . . ."

Furthermore, Justice Iredell does not agree with Justice Sutherland that sovereignty passed from the British Crown directly to the incipient Union. On the contrary, Justice Iredell sets forth at some length the doctrine that all sovereignty vested in the people and that whatever powers of external sovereignty were exercised by the Continental Congress were derived "from the people of each Province in the first instance." He reiterates this thought in numerous ways, as, for example (p. 94):

> ". . . . no authority could be conveyed to the whole but that which was previously possessed by the several parts."

And again (p. 94):

> "The authority was not possessed by congress, unless given by all the states."

The correctness of the dictum in the *Curtiss-Wright* case that sovereignty passed from the British Crown directly to the Confereration has been vigorously attacked both on legal and historical grounds in "The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory," by David M. Levitan, 55 *Yale Law Journal* (April, 1946), p. 467. This article points out the complete absence of any real sovereignty in the Continental Congress, and gives numerous historical instances of the actual exercise of external sovereignty in dealings with foreign nations by the individual States between 1776 and 1789. The article demonstrates beyond doubt that the Confederation "inherited" no power from the Crown but acquired only such powers as were delegated to it by the individual States.

BLANK
PAGE

BLANK PAGE

APPENDIX E.

I.

Crown Charter Grants to American Colonies in 16th and 17th Centuries Conveyed "Adjoining Seas" Along the Atlantic Coast.

(i) On March 25, 1584, Queen Elizabeth made a grant to Sir Walter Raleigh of lands along the Atlantic Coast known as the first North Carolina charter, conveying

> ". . . all the soile of all such landes, territories and Countreis, so to bee discovered and possessed . . . with the rights, royalties, franchises, and jurisdictions, *as well marine as other within the saide landes, or Countreis, or the seas thereunto adioyning;* . . . ."[1]

(ii) On May 23, 1609, King James executed the second Virginia charter the conveying clause of which granted

> ". . . all the *Soils,* . . . Waters, Fishings, . . . *Royalties,* . . . *both by sea and land,* being, or in any sort belonging or appertaining, ..."[2]

(iii) On March 9, 1611, King James executed the third Virginia charter, annexing all the islands within 300

---

[1] 2 Poore, Federal and State Constitutions of the United States (1878), pages 1379-1382. Appendix to Answer, pages 36-37.

[2] 2 *Poore, supra,* page 1900. *Donaldson, "The Public Domain"* (1888), page 32. Appendix to Answer, pages 38-39.

leagues of the coast, the granting clause thereof conveying the soils, lands, grounds, minerals, etc.

> "both within the said tract of land *upon the main, and also within said islands and seas adjoining* whatsoever and thereunto or thereabouts, *both by sea and* land being or situate."[3]

(iv) On November 3, 1620, King James issued the Plymouth Company charter granting all territory

> ". . . throughout the Maine Land, from Sea to Sea, *with all the Seas,* Rivers, Islands, Creekes, Inletts, Ports, and Havens, . . . all, . . . other *Royalties,* . . . . both within the same Tract of Land upon the Maine, *and also within the said Islands and Seas adjoining* . . . . to have and to hold, . . . all, and singular, the aforesaid . . . *Sea, Waters, Fishings, with all,* . . . *Royalties* . . ."[4]

(v) The 1629 Charter of Massachusetts Bay defined the coastal boundary as:

> *"from the Atlantick and westerne Sea* and Ocean on the East Parte to the South Sea on the West Parte . . . and also all islands lyeing . . . in the said Seas . . . and fishing in . . . . *the Sea thereunto adjoining."*[5]

The 1691 Charter of Massachusetts Bay defined the coastal boundary as lying between the 40th degree of lati-

---

[3]2 *Poore, supra,* page 1903. Appendix to Answer, page 39.

[4]1 *Poore, supra,* pages 922-926. Appendix to Answer, pages 40-41.

[5]3 *Thorpe, American Charters, Constitutions and Organic Laws* (1909), pages 1847-1851.

tude on the south and the 48th degree on the north and extending

> "throughout all the Main Land *from Sea* to Sea together alsoe with all . . . Soyles . . . *Royalties* . . . upon the Main and *alsoe within* the Islands *and Seas adjoyning* . . . To Have and to hold . . . all . . . the aforesaid Continent . . . and . . . *Seas* . . ."[6]

(vi) On March 4, 1629, King Charles I confirmed to Sir Henry Roswell and associates a prior grant made to them by the Council of Plymouth in March 1628 of the Massachusetts territory, the conveying clause granting, in part:

> . . . the *Seas thereunto adjoining;* and all Fishes, Royal Fishes, Whales, Balan, Sturgions, and other Fishes of what Kinde or Nature soever, . . . taken in or within the saide *Seas or Waters,* . . . TO HAVE and hould . . . all the Islands, Rivers, Portes, Havens, Waters, Fishings, Fishes, Mynes, Myneralls, Jurisdiccons, Franchises, *Royalties,* . . .[7]

(vii) On April 3, 1639, King Charles I confirmed to Sir Ferdinando Gorges a grant of Maine, previously granted to him by the Council of Plymouth, the conveying clause granting, in part,

> ". . . all and singular . . . *Prerogatives Royalties* . . . *as well by the Sea as by Lande* within the said Province and . . . *Coasts of the*

---

[6]3 *Thorpe, supra,* page 1870.

[7]1 *Poore, supra,* pages 933-935. Appendix to Answer, pages 41-42.

same . . . and within the Seas belonging or adjacent to them. . . ."[8]

(viii) On April 22, 1635, King Charles I confirmed to Captain John Mason the grant of New Hampshire made to him previously by the Plymouth Company. The prior grant, thereby confirmed, expressly conveyed

". . . *the seas* and islands lying within 100 miles of any part of said coast of the country aforesaid . . . ."[9]

and the grant then conveyed

". . . from the . . . Naumkeck River . . . thence . . . Eastwards *along the Sea Coast* to . . . passcattaway Harbor . . . & also all that South half of the Isles of Shoulds together with all other Islands and Islets . . . within 5 Leagues distance from the premisses . . . together with . . . all ye firme Lands Soyles . . . *waters* fishings . . . . *Royaltyes* . . . both within the Said Tracts of Lands upon the Maine and alsoe with ye Islands *and Seas adjoyning.*"[9a]

(ix) On April 23, 1662, King Charles II issued a charter to the Connecticut Company, the granting clause reading, in part, as follows:

". . . with the Islands thereunto adjoining, together with all firm Lands, . . . Havens, Ports, Rivers, Waters, Fishings, Mines, Minerals, ...

---

[8]1 *Poore, supra,* page 775. Appendix to Answer, pages 43-45.

[9]1 *Poore, supra,* page 1271. Appendix to Answer, pages 46-48.

[9a]4 *Thorpe, supra,* pages 2443-2444.

and all and singular other . . . *Royalties,* . . . whatsoever, within the said Tract, . . . and Islands aforesaid, or to them or any of them belonging. . . ."[10]

(x) The 1663 charter from King Charles II to the Rhode Island colony specifically reserved to British subjects

"full and free power and liberty to continue and use the Trade of Fish on the said Coast *in any of the Seas thereunto adjoining.*"[11]

(xi) On March 12, 1664, King Charles II granted to his brother James, Duke of York, the New York area, with the conveying clause granting

". . . all that Island or Islands commonly called . . . Long Island . . . Hudsons River and all the land from the west side of Connecticut to ye east side of Delaware Bay and also . . .: Martin's Vineyard and . . . Nantuckett *together with all ye lands islands soyles* rivers harbours mines *minerals* . . . *waters* . . . *and all other royalltyes* . . . to the said *severall islands lands* and premisses belonging and appertaining *with theire and every of theire appurtenances*

---

[10]1 *Poore, supra,* page 256. Appendix to Answer, pages 48-49. "Royalties," in this Charter, was held to convey to the Colony all the Crown's ownership in the adjoining sea. *Church v. Meeker* (1867), 34 Conn. 421, 427; see, also: *Barker v. Bates* (1832). 30 Mass. (13 Pick.) 255, 259.

[11]6 *Thorpe, supra,* p. 3219; *1730 Acts and Laws of Rhode Island,* page 9.

> *and all our estate . . . in or to the said lands and premises . . .*"[12]

(xii) On June 20, 1632, King Charles I issued a proprietary charter and grant to Lord Baltimore for the province of Maryland conveying

> "All that Part of the Peninsula . . . lying . . . *between the Ocean on the East* and the Bay of Chesapeake on the West . . . from . . . Watkin's Point . . . unto the main Ocean on the East; . . . Islands . . . which had been, *or shall be formed in the sea,* situate within ten marine leagues from shore; with all . . . Ports, Harbours, Bays, . . . and *Straits* belonging to the Region or Islands aforesaid, and all the Soil . . . *Straits* . . . with the Fishings . . . in the *Sea,* . . . with all . . . *prerogatives, royalties, . . . as well by Sea as by Land,* within the Region, Islands, Islettes, and Limits aforesaid . . ."[13]

(xiii) On March 24, 1663, King Charles II executed the Carolina Charter, and on June 30, 1665, issued a supplemental charter conveying

> ". . . the *royalty of the sea upon the coast* within the limits aforesaid; . . . together with all . . . *prerogative, royalties* . . . within the territory, isles, islets and limits aforesaid; . . ."[14]

---

[12]1 *Poore, supra,* pages 783-784. 2 *Poore, supra,* page 1328, Footnote. *Donaldson, supra,* page 43. Appendix to Answer, pages 49-50.

[13]3 *Thorpe, supra,* pages 1678-1679; 1 *Poore, supra,* pages 811-812; Appendix to Answer, pages 50-51.

[14]2 *Poore, supra,* pages 1383, 1390. Appendix to Answer, pages 51-52.

(xiv) On June 9, 1732, King George II issued the Georgia charter conveying

> ". . . all that . . . precinct or land, within the said boundaries, *with the islands on the sea, lying opposite to the eastern coast of the said lands, within twenty leagues* of the same, . . . *together with all the soils,* . . . *gulfs* and bays, mines, . . . waters, fishings, as well *royal fishings* of whale and sturgeon as other fishings, . . . *royalties,* . . . in any sort belonging or appertaining, *and which we by our letters patent may or can grant, and in as ample manner and sort as we may or any of our royal progenitors have hitherto granted* to any company . . . *and in as legal and ample manner, as if the same were herein particularly mentioned and expressed:* . . ."[16]

---

[16] 1 *Poore, supra,* page 373; 2 *Thorpe, supra,* page 765 *et seq.* Appendix to Answer, pages 53-54.

II.

Original States Both in Colonial Times and Since Statehood Have Always Maintained Their Ownership of the Marginal Seas.

(a) Massachusetts.

(i) *Colonial Charters.*

The 1620 Charter, the two 1629 Charters, and the 1691 Charter of Massachusetts, as previously pointed out (pp. 80-81), specifically granted "the seas" and the "seas adjoining."

(ii) *Colonial Legislation.*

By early legislation the Plymouth and Massachusetts Bay Colonies exercised rights of ownership, control and government in portions of the adjoining sea. For example, as early as 1652 the Plymouth General Court enacted a statute providing that:

> ". . . if any man take a drift whale of att the sea and bring or tow it to the shore, it [shall] be accounted his owne goods; but *if within a harbour or mile of the shore* they be taken they be reputed the townships where they are brought on shore."[17]

Again, in 1671, it was enacted by the same body that:

> ". . . all such Whales as are cast up within the Bounds of any particular Township, or floating upon the stream, *within a Mile of the Shoar,* against the said Bounds of any Township, shall be accounted the respective Towns falling within their Bounds as aforesaid . . ."[18]

---

[17] *Plymouth Colony Laws,* Part I, 96-97.

[18] Part III, *idem.,* 282 (*Revised Laws,* 1671, c. XI, §2).

In 1684 an act was passed by the Plymouth General Court relating to the catching of mackerel with seines

> "att Cape Codd or else where near any shore in this Colonie, . . ."[19]

Other statutes were enacted by the colonial legislatures of Plymouth and Massachusetts Bay Colonies affecting the territorial waters of these colonies.[20]

(iii) *County and Town Coastal Boundaries.*

In 1760 the Legislature of the Province of Massachusetts Bay fixed the coastal boundary of Cumberland County (now a part of the State of Maine) as limited

> "on the Southeast *by the Sea* or Western Ocean . . . *including all the Islands* on the Sea Coast of the said new County,"

and defined the coastal boundary of Lincoln County (now also a part of the State of Maine) as limited

> "on the South and Southeast *by the Sea* or Western Ocean; and on the North by the utmost Northern Limits of this Province; *including all the Islands* to the Eastward of the County of Cumberland aforesaid."[21]

---

[19] *Plymouth Colony Laws* (Brigham), Part II, p. 205.

[20] *Plymouth Colony Laws* (Brigham), Part II, pp. 282, 283-4 Rev. Laws 1671, c. X, Sections 3, 4.
Massachusetts Province Laws 1692-3, Chapter 32, Act of November 26, 1692, Sections 1, 2.
Massachusetts Province Laws 1702, Chapter 12, Act of November 21, 1702.

[21] *1760 Acts and Laws of Massachusetts*, Chap. II, pp. 523-526. Plaintiff's Brief, p. 94.

In 1789 the General Court of the Commonwealth of Massachusetts fixed the boundary of Washington County (now a part of the State of Maine) as bounded

> "on the south and southeast *by the sea* or western ocean, on the north by the utmost northern limits of this Commonwealth, . . . *including all the islands* on the seacoast . . . ."[22]

Until 1820 the State of Maine was a District of Massachusetts. The coastal counties of the State of Maine established by the Massachusetts Legislature in 1760 and 1789, were redrafted by the Maine Legislature in 1916 to provide that:

> ". . . the lines of the several counties which terminate at or in tide waters shall . . . include . . . the several islands in said waters, and after so including such islands shall run in the shortest and most direct line *to the extreme limit of the waters under the jurisdiction of this State;* and all waters between such lines off the shores of the respective counties shall be a part of and held to be within such counties."[23]

(iv) *Three-Mile Boundary Statute.*

In 1859, the Legislature of Massachusetts enacted that:

> ". . . the territorial limits of this commonwealth extend *one marine league* from its sea shore at extreme low water mark. If an inlet or arm of the sea does not exceed *two marine leagues* in width between

---

[22] *Massachusetts Laws* (1789), page 27. Plaintiff's Brief, page 94.

[23] *Maine Rev. Stat. 1916,* Chapter 133, Section 3, page 1514. *Maine Rev. Stat. 1930,* Chapter 143, Section 3, page 1640.

its headlands, a straight line from one headland to another is equivalent to the shoreline."[24]

It will be observed that the 1859 statute defining the coastal territorial limits of the Commonwealth was merely declaratory of existing law. As said by the Maine Supreme Court:

> "Such a statute, however, would be only declaratory of the law . . . The sovereignty of territorial waters exists even though the State has never seen fit to define their limit."[25]

As said by the Washington Supreme Court:

> "Even if our state Constitution had not declared its territorial limits to extend to one marine league off shore, it is never to be assumed, except upon the clearest evidence, that a sovereign state intends by its own legislation to renounce a right of territorial domain in which its title is clear and absolute. *Mahler v. Transportation Co.*, 35 N. Y. 352."[26]

The coastal boundaries of towns bordering upon the Atlantic were defined by the Massachusetts Legislature in 1881, and subsequently, to

> ". . . extend to the line of the Commonwealth as the same is defined in section one of Chapter one of the General Statutes."[27]

---

[24] *Massachusetts Acts (1859)*, C. 289; *Gen. Stats. 1860*, C. 1, Sec. 1. Appendix to Answer, page 708.

[25] *State v. Ruvido* (Maine, 1940), 15 Atl. (2d) 293.

[26] *State v. Pollock* (Wash. 1925), 239 Pac. 8, 9.

[27] *Massachusetts Acts 1881*, C. 196, p. 518; *Massachusetts Pub. Stats. 1882*, C. 27, Sec. 2; *Massachusetts Rev. Laws 1902*, C. 25, Sec. 1; *Massachusetts General Laws 1921*, C. 42, Sec. 1. Appendix to Answer, page 708.

(v) *Fishery Statutes:*

An 1812 Massachusetts statute prohibited any nonresident from taking any lobsters

> "within the waters and shores of the town of Provincetown"

and defined the waters and shores of Provincetown as beginning

> *"one-half mile from the shore,* by said shore to the end of Long Point which forms the harbor of Provincetown, *and from the end of Long Point, one-half mile, and including the harbor* . . . ."[28]

An 1822 law prohibited nonresidents from taking lobsters, bass, or other fish within the waters of the towns of Fairhaven, New Bedford, Dartmouth and Westport, defining these waters as extending

> "from the line of the State of Rhode Island to the line of the county of Plymouth, including all the waters, islands, and rocks, *lying within one mile* of the main land."[29]

In 1932, the State Commission on Marine Fish and Fisheries in a report to the Senate and House of Representatives of the Commonwealth of Massachusetts told of the importance of the fishing industry to Massachusetts, discussed the boundaries of the cities, towns, counties and commonwealth, stated the history of marine fisheries in relation to the decisions of this Court, and set forth an

---

[28] *Laws of Massachusetts 1812,* Chapter 27 (Laws of Massachusetts, Vol. VI, 1812-1815, page 39) approved June 22, 1812.

[29] *Laws of the Commonwealth of March 1822,* Chapter 97, page 712, passed February 22, 1822.

index of approximately 380 special Acts relative to marine fisheries enacted by the Commonwealth, the earliest being in the year 1780 and the most recent in the year 1931.

(b) Rhode Island.

(i) *Colonial Charter and Patent:*

The 1643 patent for the Providence Plantations defined the coastal boundary as

> "South *on* the ocean, . . ."[30]

and the 1663 Charter of Rhode Island and Providence Plantations defined it as

> ". . . bounded on the south *by the ocean,* . . . together with Rhode Island, Blocke Island, and all the rest of the *islands* . . . bordering upon the coast of the tract aforesayd (Ffisher's Island only excepted), . . ."[31]

In December, 1665, the King's Commissioners for the New England Colonies reported to the King upon the boundaries of Rhode Island, Connecticut, Massachusetts and New Plymouth, saying that:

> ". . . the Commissioners appointed the water the naturall bounds of each Collony to be their present bounds, untill his Majesties pleasure be further knowne."[32]

---

[30] 6 Thorpe, *supra,* page 3210.

[31] 6 Thorpe, *supra,* page 3220.

[32] 2 Rhode Island Colonial Records, page 128. Plaintiff's Brief, page 94, note 28.

(ii) *Colonial Statutes:*

In 1736 the Colonial Legislature passed an act prohibiting the use of seines in catching fish

> "*within the Extent of half a Mile distance from Point Judith Breach, in the sea,* nor . . . within the Extent of *half a Mile* of each side of the Entrance of said Petaquamscut River *in the sea.* . . ."[33]

This statute was reenacted in 1798 and is found in the 1938 General Laws of Rhode Island.[34]

(iii) *Fishery Statutes:*

In 1798 the Rhode Island General Assembly passed an act prohibiting any person to keep more than two lobster pots

> "upon or *within three miles* of any of the shores, of this State, . . ."[35]

In 1844 an Act was passed authorizing commissioners to make five to ten year leases for planting oysters on

> "any piece of land covered by the *public waters of this State* . . ."[36]

---

[33]Rhode Island Acts and Laws 1730-1736 (James Franklin's Edition), page 277, adopted June 2, 1736.

[34]The Public Laws of the State of Rhode Island and Providence Plantations, 1798 (Carter and Wilkinson, 1798 Ed.), page 496; General Laws of Rhode Island (1938), Title XXIV, page 242, Sec. 12.

[35]Public Laws of Rhode Island and Providence Plantations, 1798 (H & O Farnsworth Ed.), pages 3-4.

[36]Public Laws of Rhode Island and Providence Plantations, 1844 (Knowles & Vose Ed.), Sec. 9, page 531.

(iv) *Three-mile Boundary Statute:*

In 1872 the Legislature of Rhode Island defined the territorial limits of the State to

> ". . . extend *1 marine league* from its seashore at high water mark. When an inlet or arm of the sea does not exceed 2 marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shoreline. The boundary of counties bordering on the sea extends to the line of the State as above defined."[87]

(v) *Grants to United States:*

The State has asserted its ownership of its marginal sea in its legislative grants to the United States of submerged lands lying in the Atlantic Ocean. For example, the 1883 legislative grant in the Ocean at the entrance to Seaconett River. Another example is the grant in the ocean outside the entrance to Great Salt Pond Harbor on Block Island. Both are discussed in Appendix G to this Brief (pp. 277-278).

The foregoing provisions of the Charter and statutes of Rhode Island establish the complete fallacy in the assertion of counsel for plaintiff that Rhode Island has failed to declare its boundaries or its ownership as including its marginal sea.

---

[87]Gen. Stats. of Rhode Island, 1872, Title I, Chapter 1, Section 1; Gen. Laws 1909, Title I, Chapter 1, Section 1. Appendix to Answer, page 703.

(c) New Hampshire.

(i) *Colonial Charters:*

The 1629 Charter as previously shown (p. 82), conveyed

> "all . . . prerogatives . . . royaltyes . . . marine power in & upon *ye said Seas & rivers* . . . "[38]

and the 1635 grant expressly conveyed

> "ye Islands & *Seas adjoyning.*"

(ii) *State Constitution:*

The 1784 Constitution of New Hampshire, Article VII, provided, in part, that:

> "The people of this state, have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled."[39]

(iii) *Colonial Legislation:*

The New Hampshire Colonial Legislature enacted various laws governing its maritime territory as, for example, its erosion statute to protect the beach at Rye, New

---

[38]Thorpe, *supra*, page 2434.

[39]4 Thorpe, *supra*, page 2454. This same provision is carried into Article VII of the 1792 Constitution of New Hampshire—4 Thorpe, *supra*, page 2472; and into Article 7 of the 1902 Constitution—4 Thorpe, *supra*, page 2495.

Hampshire, adopted in 1763,[40] and laws regulating coastal fishing.[41]

(iv) *Three-mile Boundary Statute:*

Rockingham County is the only county in the State of New Hampshire which adjoins the Atlantic Ocean. In 1791 the Legislature enacted a statute defining the coastal boundary of this County

> "by the state line [with Massachusetts] *to the sea,* thence *by the sea* to the mouth of Piscateria River; *including all that part of the Isle of Shoals which belongs to this State.*"[42]

The precursor of this statute was the Colonial Boundary Act of April 29, 1769, fixing a similar line.[43] The Isle of Shoals is situated a distance of approximately nine miles in the Atlantic Ocean off the shore of New Hampshire.

In 1901 the New Hampshire Legislature approved a boundary line between it and Massachusetts which specifically extended

> "easterly to the line of jurisdiction of the said States, *one marine league* from the shore . . ."[44]

---

[40]3 New Hampshire Province Laws, 336.

[41]Act of June 1, 1687, 1 New Hampshire Province Laws 207; Act of May 9, 1687 "regulating the taking of mackerel"; 1 New Hampshire Province Laws, page 251.

[42]Act of June 16, 1791 (1791 Laws of New Hampshire, Chapter 14; Gen. Stats. 1867, Chap. 19, Sec. 2, page 69). Appendix to Answer, page 716.

[43]III New Hampshire Province Laws 524-526.

[44]New Hampshire Laws 1901, Chapter 115, page 620. Appendix to Answer, page 707. Plaintiff's Brief, pages 98, 100, Note 41.

This 1901 Act was a confirmation and definition of the boundary between these two States fixed by decree of King Charles II on April 9, 1740, which decree of 1740 provided that the boundary should be fixed

> "beginning *at the Atlantic Ocean* . . . and ending at a point . . ."[45]

Reading these boundary descriptions of the County of Rockingham and of the State, in conjunction with the rule of interpretation that where the call is "to the ocean" and "by the sea," all adjoining maritime territory is included therein, the conclusion is inescapably reached that counsel for plaintiff have again erred in their treatment of the New Hampshire boundary.

(v) *Leasing of Beds of Coastal Waters:*

One example of the declaration of ownership by New Hampshire of the marginal sea is found in the 1941 law authorizing its State Forester to issue prospecting licenses to prospect for and develop valuable mineral and natural deposits in and under the beds of "all navigable waters within the state."[46]

(d) New York.

Counsel for plaintiff make this entirely unfounded assertion with respect to New York:

> "In addition to Maryland . . . it appears that New York . . . never have claimed the marginal

---

[45] 2 Laws of New Hampshire Province, 1702-1745 (Concord 1913), pages 790-794. Erwin N. Griswold, "Hunting Boundaries with Car and Camera in the Northeastern United States" (1939), 29 The Geographical Review, pages 353-382. Plaintiff's Brief, page 99, Footnote 41.

[46] *1941 New Hampshire Laws,* Chapter 221; Appendix to Answer, page 717.

sea as being within their limits. New York's case is particularly clear."[47]

A short review of the historical facts will show how wrong counsel is in the foregoing assertion.

(i) *Charter and Constitution:*

The 1664 grant from King Charles II to his brother James, Duke of York, of the New York area, previously set forth (*supra*, pp. 83-84) was held by this Court to convey all the navigable waters within the limits of the colony.

In 1779, the Legislature of New York declared the State to be the owner of all lands formerly vested in the Crown of Great Britain; the Act providing, in part:

> "That the absolute property of all messuages, lands, tenements, and hereditaments . . . . and all right and title to the same, which next and immediately before the 9th day of July, 1776, did vest in, or belong, or was . . . . due to the Crown of Great Britain be, and the same and each and every of them hereby are declared to be, and ever since the [9th day of July, 1776], to have been, and forever after shall be vested in the people of this state, in whom the sovereignity and seigniory thereof, are and were united and vested, on and from the said [9th day of July, 1776.]"[48]

In 1828 the New York Legislature passed a statute stating that:

> "The people of this state in their right of sovereignty are deemed to possess the original and

---

[47]Plaintiff's Brief, pages 100-101.

[48]*1779 Laws of New York*, Chapter 25, Section XIII (1 Laws of New York, 1777-1784, p. 173, 178); Appendix to Answer, page 688.

> ultimate property in and to all lands within the jurisdiction of the state."[49]

and this was carried into the 1846 Constitution of New York:

> "The People of this State in their right of sovereignity are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of this State; . . ."

(ii) *Colonial Legislation:*

In 1726 the Colonial Legislature passed an act granting one Lovis de Langloiserie exclusive fishery of porpoises for a term of ten years

> "in the *seas*, harbors, rivers and other waters *within this colony.*"[50]

Legislation governing the maritime territory of this colony was enacted as, for example, the Act of May 10, 1699, for

> "securing his Majesty's and his Subjects' just Rights to all Drift-Whales, and other royal Fishes that shall be cast to the Shore *or found floating on the Coasts of this Province.*"[51]

and the "Act for Preserving Oysters" passed in May, 1715.[52]

---

[49] *Rev. Stat. New York, 1829*, Part II, Chapter I, Title I, Section 1; Appendix to Answer, page 688.

[50] II Colonial Laws of New York, pages 311-312.

[51] I Colonial Laws of New York, page 409.

[52] I Colonial Laws of New York, page 845.

Other acts for preservation of oysters were passed in December, 1737—II Colonial Laws of New York, page 1067; October 17, 1730—II Colonial Laws of New York, page 655.

(iii) *County Boundaries:*

In 1813 the New York Legislature passed a statute redefining the boundaries of the coastal counties, for example, the County of Suffolk was defined as

> "bounded easterly and southerly by the Atlantic Ocean, northerly by the sound . . . the same land continued due south *to the Atlantic Ocean* including the Isle of Wight, now called Gardiner's Island, Fisher's Island, Charter Island, Plumb Island, Robin's Island, Ram Island and the Gull Islands."[53]

The antecedent of this county boundary statute is found in the Colonial Legislature Records of 1763.[54]

The New York court has held that the foregoing county boundaries include the water area to the limits of the State boundary.[55]

(iv) *Court Declarations:*

As previously shown (Brief, p. 114), the New York courts have decreed that

> "The State owns land under water within the *three-mile limit.*"[56]

---

[53]New York Laws, 1813, Vol. II, page 31.

[54]Colonial Laws of New York, page 122.

[55]*Mahler v. The Norwich and New York Transportation Co.* (1866), 35 N. Y. 352.

[56]*People ex rel. Mexican Telegraph Co. v. State Tax Commission* (App. Div. 1927), 220 N. Y. S. 8, 17; *People v. Reilly* (1939, Magistrate Court), 14 N. Y. S. (2d) 589, 592; *Mahler v. The Norwich and New York Transportation Co.* (1866), 35 N. Y. 352.

(v) *New York-New Jersey Boundary:*

In 1833, in the settlement of the disputed boundary between the States of New York and New Jersey, the agreed boundary line extended into New York Bay

"to the main sea."[57]

Despite plaintiff's argument to the contrary (Brief, p. 101, Note 44), it is obvious that this phrase "to the main sea" in the boundary between these two States, under accepted legal rules of interpretation, extends to the limits of the adjoining maritime territory.

(vi) *Three-mile Statute:*

In 1912 the Legislature defined the marine district of the State as including

> "all waters in and adjacent to Long Island *and all tidal waters of the State,* except the Hudson River north of Verplanck's Point."[58]

In 1925 the Legislature redefined the maritime district specifically to include all tidal waters within *three nautical miles* of the state coast, the statute reading that:

> "The marine district shall include all tidal waters *within three nautical miles* of the state coast, except the Hudson River and the East River."[59]

---

[57]*1834 New York Laws,* page 9.

[58]New York Laws, 1912, Chap. 318, Sec. 300.

[59]New York Laws, 1925, Chap. 350, Sec. 1; 10 McKinney's Consolidated Laws of New York, Sec. 300.

(vii) *State Ownership of Fish:*

In 1912 the New York Legislature passed an act declaring its ownership of all fish, stating that:

> "The ownership of, and the title to, all fish . . . in the State of New York . . . is hereby declared to be in the state."[60]

(e) New Jersey.

(i) *Colonial Charter:*

The State of New Jersey was a part of the territory granted by King Charles II to his brother James, Duke of York, in 1664 and regranted in 1674. The Duke of York issued a patent to Lord John Berkeley and Sir George Carteret of New Jersey in 1664 and again in 1674, with the tract described as

> "Being to the westward of Long Island, and Manhitis Island and bounded on the east *by the main sea,* . . . and hath upon the west Delaware Bay or River, and extended southward *to the main ocean* as far as Cape May at the mouth of the Delaware Bay; . . . and also all . . . *royalties*, . . . whatsoever, to the said lands and premises belonging or in any wise appertaining; with all and every of their appurtenances, in as full and ample manner as the same is granted to said Duke of York."[61]

This and intervening grants of New Jersey were surrendered to the Crown of England in 1702 and New Jersey

---

[60]New York Laws of 1912, Chap. 318, Sec. 175; 10 McKinney's Consolidated Laws of New York, Sec. 150.

[61]5 *Thorpe, supra,* page 2534, page 2547.

succeeded to the title of all lands within the colony upon obtaining its independence in the year 1776.

(ii) *Colonial Legislation:*

Typical of the colonial legislation regulating the maritime territory of New Jersey is the Act of 1719 prohibiting any nonresident from gathering oysters or shells

"from and off any beds *within the said Province.*"[62]

(iii) *Early Declarations of Three-Mile Belt.*

New Jersey Law of March 3, 1820, for the preservation and care of wrecks, prohibited all persons from carrying away or injuring vessels stranded or in distress

"on or near the sea shores of this state, or the bays or inlets thereof . . . ."

1821 New Jersey Revised Laws, page 716.

As early as 1823 the Attorney General of the State of New Jersey asserted the State's ownership of the marginal sea out to the three-mile limit (*Corfield v. Coryell* (1823), 6 Fed. Cas. No. 3230, p. 546). Furthermore, the New Jersey courts have held from as early as 1821 that the State is the owner of the marginal sea as successor to the Crown of England (see Brief, p. 26). For example, in *Stevens v. Patterson & Newark Railroad Company* (1870), 34 N. J. Law (5 Vroom.) 532, 549, the court states that:

". . . all navigable waters within the territorial limits of the State, and the soil under such waters belong in actual propriety to the public; . . ."

---

[62]The New Jersey Provine Act of 1719 (Nevill), pages 86-88. This statute was reenacted on January 26, 1798. New Jersey Laws 1703-1799, page 262.

This was quoted with approval in *City of Hoboken v. Pennsylvania Railroad Company* (1888), 124 U. S. 656, 690.

These declarations by and on behalf of the State of New Jersey were made prior to the enactment of any statute on the subject.[63]

A statute completely ignored by counsel for plaintiff is the 1896 Act of the New Jersey Legislature prohibiting the taking of fish with nets

> "in any waters *within the jurisdiction of this State,* including the waters of the Atlantic Ocean *within three nautical miles* of the coast line of said State. . . ."[64]

(iv) *State Coastal Boundary Statute:*

In 1906 the New Jersey Legislature passed a statute providing that:

> "The territorial limits of each county of this State, fronting on the sea-coast, be and the same are hereby extended . . . *three nautical miles*"

from the shore line.[65]

In view of the foregoing enactments and declarations by and on behalf of New Jersey, and particularly in the

---

[63]See *United States v. Newark Meadows Improvement Company* (C. C. N. Y. 1909), 173 Fed. 426, 427-428.

[64]Laws of New Jersey 1896, Chapter 103, Section 1, page 151. Now 23 New Jersey Statutes Annotated (1940), Section 46, page 31. See also New Jersey Laws 1919, Chapter 94, Section 1, page 214,

"within *three nautical miles* from the coast line of this State." 23 New Jersey Statutes Annotated (1940), Section 41, page 29.

[65]*New Jersey Laws, 1906,* Chapter 260, page 542.

light of the accepted canons of interpretation with respect to the boundary of the colonial charter running

"to the ocean,"

counsel's comments on this subject are particularly inept, for counsel say that:

> "The statute of New Jersey [of 1906, defining the county boundaries] plainly implies that previously the counties, at least, and hence presumably the State, had not embraced the marginal sea. Cf. United States v. Newark Meadows Improvement Company (C. C. N. Y. 1909), 173 Fed. 426, 427-428."[66]

The very citation of the *Newark Meadows Improvement Company case* shows the lack of any possible merit in this assertion of counsel, since District Judge Hough in the *Newark Meadows case* particularly comments

> "that this holding was made and approved *before* the New Jersey Act of 1906."[67]

(f) Delaware.

(i) *Colonial Charter:*

The State of Delaware is a part of the territory included within the grant from King Charles II to his brother James, Duke of York, in 1664 and 1674, later granted by James to William Penn in 1682. In 1704, the "Three Lower Counties" of Pennsylvania were separated and established as the Delaware Colony. The boundary line between Delaware and Maryland was the subject of

---

[66]Plaintiff's Brief, pages 102-103.

[67]*United States v. Newark Meadows Improvement Company* (C. C. N. Y. 1909), 173 Fed. 426, 429.

a long dispute finally settled in 1768 with the boundary line extending across the peninsula, with the eastern end of the line in the Atlantic Ocean.

(ii) *3-Mile Statute:*

Counsel for plaintiff assert that Delaware

> "never [has] claimed the marginal sea as being within [its] limits."[68]

Apparently counsel have overlooked the 1931 Act of the Delaware Legislature prohibiting unlicensed fishing with nets

> "from the waters of the Atlantic Ocean *within three nautical miles* of the coast line of this State or from the waters of the Delaware Bay *within the jurisdiction of the State of Delaware,* . . ."[69]

(iii) *Court Decree:*

Counsel for plaintiff have also completely overlooked or ignored the 1934 decree of this Court extending the boundary line between New Jersey and Delaware *three miles* into the Atlantic Ocean outside the line from headland to headland at the mouth of Delaware Bay. This oversight obviously also destroys their comment that Delaware has never claimed the marginal seas as being within its limits.[70]

The boundary between these two States was the subject of a long controversy which was finally decided by this

---

[68]Plaintiff's Brief, page 100.

[69]1931 Laws of Delaware, page 761.

[70]Plaintiff's Brief, page 100.

Court in the year 1934 in *New Jersey v. Delaware*, 294 U. S. 361. The 1934 decree of this Court contains a map upon which the boundary between New Jersey and Delaware extends through the mouth of Delaware Bay and thence *three miles into the ocean* beyond a line drawn from Cape Henlopen to Cape May, the exterior outer headlands of Delaware Bay. (See map accompanying 295 U. S., at 700.).

(g) Maryland.

(i) *Charter and Constitution.*

The 1632 charter from King Charles I to Lord Calvert, as quoted above (p. 84), granted the Crown's

> "prerogatives, royalties, . . . as well *by Sea* as by Land,"

and also all the islands which had been

> "or *shall be* formed in the sea."[71]

In the 1776 Maryland Constitution, Article III, the State of Maryland declared its ownership of all property derived under the 1632 charter to Lord Calvert, declaring that:

> ". . . and the inhabitants of Maryland are also entitled to *all property, derived to them from or under*

---

[71] *Thorpe, supra*, pages 1678-1679; 1 *Poore, supra*, pages 811-812; Appendix to Answer, pages 50-51.

> *the Charter* granted by his Majesty Charles I to Caecelius Calvert, Baron of Baltimore."[72]

It is curious that counsel for plaintiff quote from Article III of the Maryland Constitution and the 1632 Charter but *omit* any mention of the vital portion of the 1632 Charter granting "all . . . . prerogatives, royalties, ... *as well by sea* as by land." The omitted portion clearly carries the Crown's ownership of the bed of the adjoining sea. Also disregarded by counsel is the grant of islands *thereafter formed in the sea.* Counsel's oversight in this regard completely discounts any value in their comments on the Maryland Charter and Constitution. Maryland there made a positive declaration of its ownership of the adjoining sea.[73]

(ii) *Three-mile Statute*

A 1945 Act of the Maryland Legislature provided for the disposal of real or personal property by the State, defining the terms to include

> ". . . . the land underneath the Atlantic Ocean for a distance of *three miles* from the low water mark of the coast of the State of Maryland bordering on said ocean and the waters above said land."[74]

---

[72]Plaintiff's Brief, pages 96, 97.

[73]See 1831 Laws of Maryland, Chap. 249, Sec. 1, prohibiting taking oysters from "any of the waters of the eastern coast of the state . . ."

[74]*Maryland Senate Bill No. 538,* approved April 23, 1945.

(h) Virginia.

(i) *Colonial Charters.*

The 1609 Virginia Charter and the 1611 Charter as previously seen (pp. 79-80) included the adjoining islands and

> "all . . . *Royalties*, . . . both within the said Tract of Land upon the Main and also *within the Islands* and *Seas adjoining.*"[75]

(ii) *Constitution and Statutes.*

The 1776 Constitution of Virginia continues the Charter titles and boundaries by saying that:

> "The western and northern extent of Virginia shall, in all other respects, stand *as fixed by the Charter of King James I* in the year one thousand six hundred and nine, and by the public treaty of peace with the Courts of Britain and France, in the year one thousand seven hundred and sixty-three; . . ."[76]

The 1849 Code of Virginia, Chapter I, Sec. 1, recites these three Charters, and thereupon declares that:

> "The territory of this commonwealth and the boundaries thereof remain as they were after the said constitution was adopted on the twenty-ninth of June, seventeen hundred and seventy-six.",

with certain exceptions concerning the cession of territory northwest of the Ohio River, etc.[77]

---

[75] 7 *Thorpe, supra,* page 3804; 2 *Poore, supra,* page 1903; Appendix to Answer, page 39.

[76] 7 *Thorpe, supra,* pages 3818-3819.

[77] 1849 Code of Virginia, Title I, Chapter 1, Sec. 1, pages 48, 49.

Under the rule of construction that cessions of land territory automatically convey the adjoining maritime territory; and that clauses in governmental cessions or state boundaries running "to the sea" or "along the coasts" are construed to include the adjoining maritime belt, it is obvious that Virginia in her 1776 Constitution and in her 1849 Code confirmed the State's title to the marginal sea received under the earlier Charters.

(iii) *Three-mile Statute.*

A "three-mile statute" of Virginia, enacted in 1936, overlooked by counsel for plaintiff, makes it unlawful to catch fish with a trawl net in certain areas of the Virginia coast

> "within the three-mile limit."[78]

(i) North Carolina.

The 1665 Charter of Carolina was bounded on the north by 36°30″ northern latitude and on the south by 29° latitude granting among others

> ". . . the fishings of all sorts . . . within the premises . . . *together with the royalty of the sea upon the coasts* within the limits aforesaid . . ."[79]

---

[78] *Virginia Statutes 1936*, page 663, Virginia Code, Title 27, Chapter 127, Section 3176.

[79] 5 *Thorpe, supra*, page 2762; 2 *Poore, supra*, pages 1383, 1390; Appendix to Answer, pages 51-52.

(i) *Constitution.*

In the 1776 Constitution of North Carolina, Article XXV contains a declaration of State's ownership of the land *and the seas,* describes the boundary between North and South Carolina and then declares that:

> "Therefore, *all the* territories, *seas,* waters, and harbors, with their appurtenances, lying between the line above described and the southerly line of the State of Virginia, which begins on the seashore in 36°30″ North latitude and from thence runs west, *agreeable to the said Charter of King Charles, are the right and property of the people of this state,* to be held by them in sovereignty . . . "[80]

This is a positive declaration of the State's ownership of the "seas" lying between the boundary line of the State on the north and the State on the south *under the Charter.*

There is no merit in the argument of counsel for plaintiff that the word "seas" in the foregoing declaration of ownership in the 1776 Constitution must, so counsel assert, "refer to the numerous sounds within the State, rather than the ocean proper, since one of the lines 'described' was the 'seashore.' "[81] The error of this assertion is especially clear when due consideration is given to the accepted legal meaning of the specific wording in the 1665 Charter granting *"the royalty of the sea upon the coast,"* and the specific reference in the 1776 Constitution to "agreeable to the said charter of King Charles."

---

[80]5 *Thorpe, supra,* pages 3788, 3789; 2 *Poore, supra,* page 1410; Appendix to Answer, page 53.

[81]Plaintiff's Brief, page 97, note 38.

(ii) *Three-mile Statute.*

Counsel for plaintiff have also overlooked the "three-mile" statute in North Carolina. In 1911, the North Carolina General Assembly enacted a statute prohibiting fishing by nonresidents within the waters of the State and provided that

> "the following boundaries are hereby declared to be the boundaries to which the waters of the State extend, to-wit: a distance of *three (3) nautical* miles . . . out into the Atlantic Ocean. . . ."[82]

(j) South Carolina.

The boundaries of South Carolina are predicated upon the 1665 Charter of Carolina, the pertinent portions of which are set forth under the section on North Carolina, *supra.*

(i) *Boundary Statutes.*

The boundaries of the State compiled from 1 South Carolina Statutes at Large, pages 405-424, are described as commencing at a stake

> "on the shore of the Atlantic Ocean. . . . Thence along the River Savannah until it intersects the Atlantic Ocean, by its most Northern mouth. Thence North-eastwardly *along the Atlantic Ocean* (including Islands) until it intersects the Northern boundary near the entrance of Little River."[84]

---

[82]Public Laws of North Carolina, 1911, page 268; Laws of North Carolina, 1931, p. 35; *North Carolina Gen. Stats.*, Secs. 113-235. *North Carolina Gen. Stats.*, Secs. 113-242.

[84]*Drayton, "Views of South Carolina"* (1802). II Code of So. Car. (1940), Sec. 2038. Plaintiff's Brief, page 96.

Article VI, Section 3, of the 1868 Constitution of South Carolina provides that:

> "The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State, and all lands the title to which shall fail from defect of heirs shall revert or escheat to the people."[85]

In the 1868 Constitution of South Carolina, Article I, Section 40, provides that:

> "All navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost or toll imposed; . . ."[86]

These same boundaries are carried into later statutes.[87]

Under the rule of interpretation that where the call is "to or by the ocean" the adjoining maritime territory is included it is the inescapable conclusion that South Carolina has always claimed the ownership of its marginal sea. This is particularly clear in view of Article VI, Section 3, of its Constitution declaring the State to be the ultimate owner of all lands within its jurisdiction.

(ii) *Three-mile Statute.*

The three-mile limit was fixed by the South Carolina Legislature in 1924 in declaring the common right of the people of the State to take the fish, stating that:

> "The waters and bottoms of bays . . . within the State or *within three miles* of any point along low

---

[85] 6 *Thorpe, supra,* page 3297, carried into the 1895 Constitution, Article XIV. 6 *Thorpe, supra,* page 3342.

[86] 6 *Thorpe, supra,* pages 3284-3285.

[87] *Rev. Stats. South Carolina (1873),* Part I, Title I, Chapter I, Section 1; *Gen. Stats. 1882,* Part I, Title I, Chapter I, Section 1;

water mark of the coast thereof . . . shall continue and remain as a common for the people of the State for the taking of fish . . . ."[88]

(iii) *Grants to United States.*

The half-dozen or so grants in fee made by the State of South Carolina to the United States of portions of the marginal sea are conceded by counsel for plaintiff to lie in the "open sea" (discussed in the chapter on Acquiescence in this Brief, *supra*, p. 164, Appendix G, pp. 272-276).

(k) Georgia.

(i) *Charter.*

The 1732 charter from King George II to Oglethorpe described the grant as a tract

> "which lies from the . . . Savannah, *all along the sea coast* to the southward onto the . . . river called the Alatamaha . . . *with the islands on the sea*, lying opposite to the eastern coast of said lands, within 20 leagues of the same . . . together with all soils . . . *gulfs* . . . waters, fishings, . . . *royalties* . . . in any sort belonging or appertaining, and which we by our letters patent can grant, and in as ample manner or sort as we may or any of our royal progenitors have hitherto

---

Civil Code South Carolina (1902), Part I, Title I, Chapter I, Section 1; *South Carolina Civil Code* (1912), Part I, Title I, Chapter I, Section 1. Appendix to Answer, page 653.

[88]*1924 Civil Code of South Carolina* (1933), Section 1016; *1942 Code of South Carolina*, Volume II, Section 3300.

granted to any company . . . in as large and ample manner, as if the same were herein particularly mentioned and expressed."[89]

(ii) *Boundaries.*

The boundaries of the State of Georgia were defined in an Act of February 17, 1783, as follows:

"The limits, boundaries, jurisdictions and authority of the State of Georgia do, and did, and of right ought to extend *from the sea* or mouth of the River Savannah . . . . then along the middle of St. Mary's River, *to the Atlantic Ocean,* and from thence to the mouth or inlet of Savannah River, the place of beginning; including and comprehending all the lands and *waters* within the said limits, boundaries, and jurisdictional rights; and also *all the islands within 20 leagues of sea-coast.*"[90]

The 1783 Statute of Georgia further declared that the "limits, boundaries and jurisdictional right above mentioned . . . as secured to the Inhabitants and free Citizens thereof *by their Charter,* . . ."

The 1798 Constitution of Georgia contained a substantially identical boundary description to that of the 1783 Act.[91]

The Political Code of Georgia, Section 17, adopted in the year 1861 and readopted in 1868 and subsequently,

---

[89]2 *Thorpe, supra,* page 771. 1 *Poore, supra,* page 373. Appendix to Answer, pages. 53-54.

[90]19 *Colonial Records of the State of Georgia,* Part II, page 214.

[91]2 *Thorpe, supra,* page 794. Appendix to Answer, page 647.

defined the easterly boundary of the State in the same language as in the 1798 Constitution.[92]

These boundary definitions in the Georgia statutes and Constitutions, when read in the light of the accepted canons of interpretation, obviously included all the adjoining marginal sea.

(iii) *Three-Mile Statutes:*

The Georgia Legislature in 1916 enacted a statute redefining the eastern boundary of the State as running

> ". . . along the middle of said [St. Mary's] river *to the Atlantic Ocean, and extending therein three English miles from low-water mark;* thence running in a northeasterly direction and following the direction of the Atlantic coast to a point opposite the mouth, or inlet, of said Savannah River, and from thence to the mouth or inlet of said Savannah River . . . *including all the lands, waters, islands, and jurisdictional rights within said limits, and also all the islands within 20 marine leagues of the seacoast.*"[93]

In 1924 the Georgia Legislature passed a statute prohibiting fishing with nets from certain areas, with a definition of the waters as being

> "from the outermost part of the coast line to the limit of the *three-mile jurisdiction* and embrace that part of the Atlantic Ocean under the jurisdiction of the State to Georgia."[94]

Various Acts of the Legislature of the State of Georgia declaring and exercising its ownership of the marginal sea are set out in the Appendix to the Answer, pages 647-652.

---

[92]Appendix to Answer, page 647.

[93]*1916 Georgia Act No. 410;* Amended Code (1916), Section 16. Appendix to Answer, pages 647-648.

[94]*1924 Georgia Laws,* page 116.

BLANK

PAGE

BLANK
PAGE

APPENDIX F.

PRESCRIPTION.

(Third Affirmative Defense)

I.

Facts Establishing California's Prescriptive Title.

1. Declarations of State's Ownership.

The Legislature of the State of California in the year 1872 enacted Civil Code Section 670, declaring, in part, that:

> "§670. *Property of the State.* The State is the owner of all land below tide-water and below ordinary high-water mark, bordering upon tide-water within the State; . . ."[1]

The boundary is described in both the 1849 and 1879 Constitutions as extending 3 miles into the Pacific Ocean.

In 1872 California declared its sovereignty and jurisdiction as extending to all places within its boundaries established by the Constitution by enacting Political Code, Section 33:

> "The sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, . . ."

qualified only as to places where jurisdiction is ceded to the United States.

---

[1]Appendix to Answer, p. 741.

In the 1879 California Constitution, Article XV, Section 3, it is provided, in part, that:

> "Sec. 3. All tide-lands[2] within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay or inlet, used for the purposes of navigation, shall be withheld from grant or sale to persons, partnerships, or corporations."

In more than fifteen separate public Acts of the Legislature, extending over the years from 1911 to 1943, the State continually declared itself to be the owner of the submerged lands within the three-mile belt of the Pacific Ocean. Several typical examples of the declarations contained in this type of statute are as follows:

> "Whereas, Since the admission of California into the Union, . . . all lands lying beneath the navigable waters of the State have been and now are held in trust by the State for the benefit of all the inhabitants thereof . . ."[3]

---

[2]The word "tide-lands" used in Article XV, Section 3, of the California Constitution has been construed by the Supreme Court of California to embrace lands properly described as "submerged lands"; and that said restriction upon alienation thereof applies equally to tidelands and submerged lands owned by the State. *San Pedro, Los Angeles and Salt Lake Railroad Company v. Hamilton* (1911), 161 Cal. 610, 614. This constitutional restriction has been construed as not placing a restriction upon *leases* of tide and submerged lands by the State or by its municipal grantees. *San Pedro, Los Angeles and Salt Lake Railroad Company v. Hamilton, supra.* Likewise, this constitutional restriction has been construed not to prohibit the State from granting permits and leases to prospect for and extract oil and gas on, in and under the tide and submerged lands owned by the State. *Kelly v. Kingsbury* (1930), 210 Cal. 37; *Boone v. Kingsbury* (1928), 206 Cal. 148.

[3]Cal. Stats. 1911, p. 1357; Cal. Stats. 1917, p. 18.

Another frequent form of declaration of ownership used in this same type of statute involved a public statement by the Legislature that it thereby granted to the named municipality

> "all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city and situated below the line of mean high tide of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries,"

which said tide and submerged lands were then

> "held by said State by virtue of its sovereignty."[4]

Another declaration of California's ownership by the California Legislature was made in a 1929 emergency act for the regulation of leasing for oil and gas purposes of tide and submerged lands of the State wherein the Legislature declared that the State Surveyor General had since the year 1927 refused to file any applications for or grant any permits

> "on the tide . . . submerged lands of the State"

and that the Legislature believed

> "the tide . . . submerged lands of the State"

should not be open for prospecting for or production of oil and gas.[5]

---

[4]Cal. Stats. 1911, p. 1304; Cal. Stats. 1911, p. 1256; Cal. Stats. 1915, p. 62; Cal. Stats. 1917, p. 90; Cal. Stats. 1919, p. 941; Cal. Stats. 1919, p. 1011; Cal. Stats. 1925, p. 181; Cal. Stats. 1929, p. 117; Cal. Stats. 1929, p. 254; Cal. Stats. 1943, p. 1294. (Appendix to Answer, pp. 743-754.)

[5]Cal. Stats. 1929, p. 11.

Again the Legislature declared the State's ownership of the submerged lands in an Act approved May 28, 1929, defining the term "submerged and overflowed" lands as used in said Act governing the issuance of oil and gas prospecting permits and leases covering such submerged lands, by enacting that it

> "shall be deemed and construed as applying only to the *bed of the ocean* or other lands over which the tide of the ocean ebbs and flows."[6]

Similar declarations of the State's ownership of the submerged lands in the Pacific Ocean along the coast of California have been made by the California judiciary. For example, in *Boone v. Kingsbury* (1928), 206 Cal. 148 (certiorari denied 280 U. S. 517), the Court upheld the validity of a 1921 Act providing for the execution of oil and gas leases by the State upon the tide and submerged lands, and ordered the issuance of permits and leases extending into the Pacific Ocean distances ranging up to three-fourths of a mile from the shore line, and in so doing the Court declared, quoting at length from prior decisions of this Court, that:

> "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to State regulation and control, . . ."

---

[6]Cal. Stats. 1929, p. 944.

2. Acts of Occupation, Possession and Use:

(a) GRANTS BY STATE TO COASTAL MUNICIPALITIES OF LARGE PORTIONS OF THREE-MILE BELT.

Many of the legislative grants to the coastal municipalities and counties of the submerged lands within the three-mile belt of the Pacific Ocean lying in front of these cities and counties, are set forth in some detail in the Appendix to Answer (pp. 742-753). The boundaries of these coastal cities and counties to which the State made these legislative grants of all submerged lands within such boundaries extend for miles along the California coast and run out into the Pacific Ocean to the State boundary line, in many instances, and in other instances run out distances of as far as one-half mile into the Pacific Ocean.

(b) CONSTRUCTION OF PIERS, WHARVES, AND BREAKWATERS.

Immediately after its foundation as a State, California commenced granting franchises to construct and maintain wharves upon the submerged lands owned by the State by special acts of its Legislature.[6-11]

[6-11] For example, by Act of May 15, 1854, the Legislature of the State of California authorized the Mayor and Common Council of the City of Santa Barbara to grant a franchise for the construction and maintenance of a wharf in the Pacific Ocean in front of said City, and the State granted to the Mayor and Common Council of the said City for that purpose

> "the right of the State to such lands covered by water as may be necessary for that purpose."

Cal. Stats. 1854, p. 153. See, also, Cal. Stats. 1855, p. 277; Cal. Stats. 1855, p. 291.

On April 8, 1858, the California Legislature approved an Act authorizing the Boards of Supervisors of the coastal counties to grant franchises to California citizens to construct wharves, chutes and piers "on the submerged lands of this State."[12] Following the enactment of the 1858 statute the Boards of Supervsors of the several coastal counties issued large numbers of wharf and pier franchises under that legislative authorization and have continued so to do over the years to the present time. Some of these franchises extended into the Pacific Ocean distances up to three-fifths of a mile. The details of some thirty of these wharf and pier franchises granted by the Boards of Supervisors of the several coastal counties in the southern portion of the State, extending over the years 1868 down through 1938, together with a typical map required to be filed by each franchise applicant, are set forth in the Appendix to Answer (pp. 801-808). These are only a part of the many franchises that have been granted on the coast line of the entire State.

A typical wharf franchise granted under the 1858 Act, as amended, is one granted on July 9, 1885, by the Board of Supervisors of the County of Santa Barbara to Frank M. Micherin. That franchise authorized Micherin to construct and maintain a wharf near the mouth of the Santa Ynez River in Santa Barbara County:

"extending into the Pacific Ocean one thousand feet"

---

[12]Cal. Stats. 1858, p. 120. The 1858 Act was amended in 1870 and thereafter in the year 1872 became a part of Political Code Sections 2906, *et seq.* Said Section 2906 was amended by Act of the Legislature of 1913. (Cal. Stats. 1913, p. 947.) In 1937, Sections 2906, *et seq.* of the Political Code were made a part of the Harbor and Navigation Code in Sections 4000, *et seq.* thereof. Appendix to Answer, pp. 799-808.

and also granted him a right of way over

> "the overflowed, submerged or tide lands belonging to this State and over which it is proposed to extend said wharf as shown in said Petition, the quantity thereof being all included in a rectangular tract one thousand feet long and seventy-five feet wide, extending to a point one thousand feet from the line of high water mark."[13]

(c) Construction of Groins, Jetties and Sea-Walls.

In 1931, Section 690.10 of the Political Code was enacted authorizing the State Land Commission (then named Division of State Lands) to grant any owner of littoral lands the right to construct, alter or maintain groins, jetties, wharves, sea-walls or bulkheads

> "upon, across or over any of the . . . tide or submerged lands of this State bordering upon such littoral lands."[14]

In 1941 the Legislature reenacted Section 690.10 of the Political Code as a part of the then new Public Resources Code as Section 6321, *et seq.*[15]

One illustration of the numerous permits granted by the State since 1931 to littoral owners along the coast of California to erect groins, jetties, sea-walls and bulk-heads on submerged lands in the Pacific Ocean, are the permits granted to Union Realty Company, a corporation, to maintain two groins upon the State-owned tide and submerged lands in the Pacific Ocean in Santa Barbara County.[16]

---

[13]Appendix, Answer pp. 804-805.
[14]Cal. Stats. 1931, p. 925.
[15]Cal. Stats. 1941, p. 1880.
[16]Appendix to Answer, pp. 809-810.

(d) Oil and Gas Leases of Submerged Lands.

The State in the year 1921 passed an Act for the exploration and development of oil and gas from under the ocean. In that same year, the State commenced receiving applications and within a matter of months issued leases in the Summerland Oil field.[17] This is contrary to the erroneous assertion of counsel for plaintiff that "it was not until some years" after 1921 before the State undertook generally to issue leases under this Act.[18]

The 1921 Act and its later amendments and supplements are now summarized:

(i) By Act approved May 25, 1921,[19] the State Surveyor General was authorized to grant permits to California residents giving the exclusive right for a period not to exceed two years to prospect for oil and gas on not to exceed 640 acres of land upon specified terms and conditions. The Act contained the limitations that in case the application for a permit covered

> "submerged land by anyone other than the littoral or riparian proprietor, said littoral or riparian proprietor shall have six months within which to file an application for a permit or lease, but if said littoral or riparian proprietor fails to

---

[17]

Application	*Filing Date*	*Date Lease Issued*	*Lessee*
No. 16	July 20, 1921	Feb. 21, 1922	Becker
No. 17	Sept. 26, 1921	Feb. 21, 1922	Submarine Oil Co.
No. 18	Oct. 10, 1921	Feb. 21, 1922	So. Pac. Land Co.
No. 21	March 13, 1922	April 1, 1922	Seaside
No. 22	March 27, 1922	April 1, 1922	Lillis Oil Co.

[18]Plaintiff's Brief, pages 186-187.

[19]Cal. Stats. 1921, Chapter 303, p. 404.

> comply with the requirements of this Act . . . his preferential right shall thereupon cease . . . and the original applicant shall be permitted to proceed with his application."

Upon satisfying the State Surveyor General that valuable deposits of oil and gas had been discovered within the submerged land embraced in the permit, the Act entitled the permittee to a lease for one-fourth of the land embraced in the prospecting permit for a term of twenty years upon payment of royalty to the State at the rates fixed in the Act. The permittee also had the additional preferential right to lease the remainder of the land embraced in his prospecting permit at an increased statutory royalty payment to the State.

(ii) In 1923 the California Legislature amended the 1921 Leasing Act to grant a preferential right to a lease of submerged land to a littoral or riparian owner, who, without objection by the State of California or other official, had entered upon the submerged lands for more than ten years preceding the passage of the Act and had engaged in drilling or operating a producing oil well, provided that application be made by said littoral or riparian owner within three months after the passage of the Act.[20]

Pursuant to the 1921 Act and this 1923 amendment, seven leases were granted by the State of California to individual lessees in the Summerland Oil Field in Santa Barbara County. These seven leases extended along the coast of the Pacific Ocean a dis-

[20]Cal. Stats. 1923, p. 593.

tance of more than a mile and ran out into the Pacific Ocean distances up to approximately one-third of a mile.[21]

Two hundred and eight California residents filed applications before September 1, 1929, for oil and gas prospecting permits with the State Surveyor General pursuant to the 1921 Act. Each of said applications covered substantial tracts of submerged lands lying in various parts of the Pacific Ocean, the Santa Barbara Channel, Santa Monica Bay, San Pedro Bay and San Pedro Channel. Following upon the decision of the California Supreme Court in the test case under the 1921 Act, namely *Boone v. Kingsbury* (1928), 206 Cal. 148, wherein certiorari was denied by this Court (280 U. S. 517), the State Surveyor General granted leases under the 1921 Leasing Act to a substantial number of said two hundred and eight applicants, being those who completed their prospecting and development work pursuant to the requirements of said Act. Oil and gas were discovered in substantial quantities by the year 1929 in five separate submerged land fields and leases were accordingly granted to the qualifying applicants under Chapter 303 of the 1921 Act, said leases being known as "Chapter 303 Leases." Some of the details of these Chapter 303 Leases in the Seacliff Field, Elwood Field, El Capitan Field, Carpenteria Field and the Goleta Field are set forth in the Appendix to Answer (pp. 763-773). These Chapter 303 Leases in the five submerged land oil fields extended along the shoreline of the coast a number of miles and ran

[21]Appendix to Answer, pp. 757-758 and map facing p. 758.

out into the Pacific Ocean distances up to approximately one mile.

(iii) The 1929 California Legislature enacted legislation prohibiting the filing of any application for a permit to prospect for oil or gas on tide or submerged lands of the State, saving, however, the preferential rights of applicants whose applications were filed prior to September 1, 1929.[22]

(iv) The 1931 California Legislature amended Political Code Section 675, granting the State Director of Finance power to lease on terms prescribed by him, any State land for the production of oil and gas. However, this legislation was defeated by referendum to the people.[23]

(v) The 1933 California Legislature amended the 1921 Leasing Act so as to authorize the State Surveyor General to negotiate agreements compensating the State for drainage of oil and gas from State lands as a result of the operation of oil wells upon private lands.[24] Pursuant to said 1933 legislation, the State entered into a large number of "easement agreements" with individuals and corporations. One of these easement agreements was executed in the year 1933, sixty-seven were executed in the year 1934, two in 1938, and four in 1940. Each of these "easement agreements" related to oil wells located in the Huntington Beach Oil Field extending into the Pacific

---

[22]Cal. Stats. 1929, p. 11; Cal. Stats. 1929, p. 944. Appendix to Answer, pp. 773-775.

[23]Cal. Stats. 1931, p. 845. Appendix to Answer, p. 775.

[24]Cal. Stats. 1933, p. 1523. Appendix to Answer, p. 775.

Ocean distances up to approximately one-third of a mile.[25]

(vi) In 1935, bills passed both Houses of the Legislature providing for granting to littoral owners along the Pacific Ocean the exclusive right to secure State leases to drill slant wells into and produce oil and gas from the submerged lands of the Pacific Ocean upon payment of a statutory royalty to the State. However, this measure was vetoed by the Governor of California.[26]

(vii) In 1936 an initiative proposition was presented to the California electorate at the General Election on November 3, 1936, providing for the granting to littoral owners along the Pacific Ocean of the exclusive right to secure State leases to drill slant wells into and produce oil and gas from submerged lands in the Pacific Ocean upon payment to the State of a specified royalty. This initiative proposition, however, was defeated by a majority of the voters at said election.[27]

(viii) The 1938 California Legislature enacted a statute entitled "State Lands Act of 1938."[28] The State Lands Commission thereby created was given jurisdiction over all State lands including oil, gas and other minerals in and under the tide and submerged lands of the State, and prohibited any other state,

---

[25]Appendix to Answer, pp. 775-778, and map facing p. 778.

[26]Appendix to Answer, p. 779.

[27]Appendix to Answer, p. 779.

[28]Cal. Stats., Ex. Sess. 1938, Chap. 5, p. 23. Appendix to Answer, p. 779.

city or county authority from granting any right to extract oil or gas from tide or submerged lands,

"over which the State is owner."

The State Lands Act of 1938 authorized the State Lands Commission to lease tide and submerged lands of the State *only* when it knew or believed that such lands contained oil and gas deposits which might be or were being drained by means of wells on adjacent lands not owned by the State.[29]

(ix) Pursuant to the State Lands Act of 1938 and Public Resources Code Section 6871, the State Lands Commission of the State of California has executed oil and gas leases embracing submerged lands lying in the Pacific Ocean, some lying in the Santa Barbara Channel thereof, and some lying under navigable rivers or other navigable waters. Said leases are commonly referred to as "P. R. C. Leases." The State Lands Commission has during the period from 1940 to 1945 issued eight oil and gas leases covering submerged lands along the Pacific Ocean, and in the Santa Barbara Channel of the Pacific Ocean. These are located in the Goleta Oil Field, the Huntington Beach Oil Field, the Rincon Oil Field, the Elwood Oil Field and the Seal Beach Oil Field. These eight additional leases extend several miles along the shore of the Pacific Ocean and run out into the Pacific Ocean distances ranging from one mile to three miles therein.[30]

---

[29]The State Lands Act of 1938 was, by the 1941 Legislature, incorporated into Public Resources Code as Sections 6871-6878 Cal. Stats. 1941, p. 1902. Appendix to Answer, pp. 780-781.

[30]Appendix to Answer, pp. 781-787, and maps facing pp. 782, 784, 786, 764 and 766.

(x) Under the "Chapter 303" leases granted by the State to the numerous lessees, many piers, wharves and artificial islands were constructed by such lessees over and upon the submerged lands of the Pacific Ocean extending therein as far as 3,600 feet, or approximately two-thirds of a mile. War Department permits were first applied for and obtained by each lessee prior to the construction of such wharves, piers or islands. Each such applicant for a War Department permit notified the War Department through its local United States District Engineer's Office that the applicant was the holder of a specific lease granted by the State of California for oil and gas prospecting and development covering submerged lands in the Pacific Ocean as shown on attached plans and designs.[31]

(xi) The State of California has granted more than one hundred "Chapter 303" prospecting permits and leases, "P. R. C." leases, and "easement agreements" covering submerged lands extending into various portions of the Pacific Ocean, Santa Barbara Channel, San Pedro Channel and various arms of the sea. A map outlining the locations of these leases and agreements is set opposite page 146 of this Brief.

(xii) The lessees under said permits, leases and easement agreements have drilled in excess of 350 oil and gas wells in and under the submerged lands of

[31] Appendix to Answer, pp. 788-798, and maps facing p. 791-796.

the Pacific Ocean and the various arms of the sea since the year 1921. These lessees have expended as drilling and development costs (exclusive of operating and maintenance costs) in excess of $20,000,000.[32]

(e) Assessment and Collection of Taxes on Submerged Lands.

For example, the County Assessor of the County of Santa Barbara has assessed the mineral rights of lessees under State permits and leases in the Elwood Oil Field, since the discovery of that field in 1929 through the year 1945, for a total valuation of such mineral rights of $55,485,000.[33]

In addition, the County Assessor of Santa Barbara County has separately assessed a personal property tax upon the personal property improvements placed on or in connection with said State Tide and Submerged Land Leases in the Elwood Oil Field, for a total assessment of $200,562 for the years 1929 through 1938.[34]

(f) Fishing Industry.

Ever since its formation as a State, California has exercised its right of ownership and control over the fish in the coastal waters of California. The courts have con-

---

[32]Appendix to Answer, p. 799.

[33]This covers State Tide and Submerged Land Leases Nos. 88, 89, 90, 91, 92, 93, 94, 98 and 129. Appendix to Answer, pp. 810-812.

[34]Appendix to Answer, pp. 811-812.

sistently declared California to be the owner of all the fish life within its coastal waters,[35] which ownership of the

---

[35]In *In re Marincovich* (1920), 48 Cal. App. 474, the Court stated that:

> "The dominion of the State or Nation over the seas adjoining its shores is for the purpose of protecting its coast. . . . Included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or fish attached to or embedded in the soil. (*Massachusetts v. Manchester,* 152 Mass. 230; *Manchester v. Massachusetts,* 139 U. S. 234; *Dunham v. Lamphere,* 3 Gray (Mass.) 268; *Humboldt L. M. Association v. Christopherson,* 73 Fed. 239; *Notes to State v. Shaw,* 67 Ohio State 157, 60 L. R. A. 481, 65 N. E. 875; *16 Amer. and Eng. Encyclopaedia of Law* (2d Ed.), 1132; 36 Cyc. 830.) . . . Wild game (included within which is fish . . .) always has belonged to all the people of the State. It is evident, therefore, that what the people of the State own they can alienate on such terms as they choose to impose. . . ."

People v. Truckee Lumber Co. (1897), 116 Cal. 397, 399; *Suttori v. Peckham* (1920), 48 Cal. App. 88, 90; *People v. Stafford Packing Company* (1924), 193 Cal. 719, 725, where the Court stated that:

> ". . . the general right and ownership of fish is in the people of the State and . . . the State has the right to regulate and control the taking and disposition thereof."

People v. Monterey Fish Products Co. (1925), 195 Cal. 548, 563, where the Court stated that:

> "The title to and property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the State . . . ."

Paladini v. Superior Court (1918), 178 Cal. 369, 371; *Bayside Fish Flour Co. v. Zellerbach* (1932), 124 Cal. App. 564, 566; *Bayside Fish Flour Co. v. Gentry* (1936), 297 U. S. 422, 426, upholding a California statute prohibiting wastage of sardines taken in the Pacific Ocean, where the Court stated, in a unanimous opinion, that:

> "Over these fish, the State has supreme control."

Santa Cruz Oil Corp. v. Milnor (1942), 55 Cal. App. (2d) 56, 63; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409, stating, in part, that:

> ". . . a State is the owner of its fisheries for the benefit of its citizens and can impose any condition upon the taking and use . . ."

Van Camp Sea Food Company v. Dept. of Natural Resources (D. C. Cal. 1929), 30 Fed. (2d) 111, 112; *Ocean Industries, Inc. v. Greene* (D. C. Cal. 1926), 15 F. (2d) 862.

fish arises by reason of the State's ownership of the soil underlying all navigable waters within its boundaries.[36]

In 1851 the State Legislature passed a statute making it unlawful for any person to stake off any natural oyster bed or prevent any person from taking oysters from any such bed

> "on any of the lands belonging to this State below low water mark";[37]

and likewise authorized the planting of oysters, where there was no natural growth, on any lands of the State below low water mark.

In 1872 the Legislature prohibited the taking of any salmon between certain months and prohibited the use

---

[36]This basis of ownership of fish arising out of the ownership of the soil under the navigable waters within the State's boundary is developed above.

Manchester v. Massachusetts, 139 U. S. 234; *Dunham v. Lamphere,* 3 Gray (Mass.) 268; *McCready v. Virginia,* 94 U. S. 391. *Smith v. Maryland,* 18 Howard 71, at 75, states that:

> "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the mode of that enjoyment so as to prevent the destruction of the fishery. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

The Abby Dodge, 223 U. S. 166, 174.

[37]Act of April 28, 1851 (Cal. Stats. 1851, p. 432). Act of April 2, 1866 (Cal. Stats. 1866, p. 847) authorized anyone discovering natural oyster beds

> "in the bays, coast or inlets of this State or in the waters or flats adjoining the same"

to appropriate such oysters to their own use. By the Act of March 30, 1874 (Cal. Stats. 1873-74, p. 940), the Legislature authorized any citizen of the United States to plant oysters in any

> "public waters of this State"

and provided that such person shall have the ownership and exclusive right to take up and carry off such oysters. See *Darbee Oyster and Land Co. v. Pacific Oyster Co.* (1907), 150 Cal. 392.

of certain substances in the taking or destroying of fish in "the waters of this State."[38] In the same year the Legislature prohibited the destruction of any seal or sea lion off the coast within one mile of a designated point.[39]

In 1876 the Legislature prohibited the taking of shrimps with traps or nets "in any of the waters of this State."[40]

A vast number of legislative, and two constitutional, enactments were passed by the succeeding California Legislatures or adopted by the people regulating the fisheries within the coastal waters of the State. A few of the more important are summarized as follows:

(i) In 1902 the California Constitution was amended to authorize the Legislature to divide the State into Fish and Game Districts and enact such laws for the protection of fish and game therein as may be deemed appropriate to the respective districts, in order to permit local and special legislation.[41]

(ii) Again in 1910 the California Constitution was amended to provide that the people of the State shall have the right to fish upon and from "the public lands of the State and in the waters thereof," reserving to the Legislature the power to provide for the season when and the conditions under which the different species of fish may be taken.[42]

(iii) The Legislature divided the State into some twenty-five or more Fish and Game Districts and

---

[38]Penal Code, Secs. 634-635, approved April 14, 1872.

[39]Penal Code, Sec. 599 (repealed in 1880).

[40]Act approved April 1, 1876, Cal. Stats. 1875-76, p. 115.

[41]Article IV, Sec. 25½, of the California Constitution adopted November 4, 1902.

[42]Article I, Sec. 25, of the California Constitution adopted November 8, 1910.

has changed the boundaries of these districts from time to time. At the same time, the State has regulated the seasons and methods of catching and taking fish from these districts, including the districts covering the coastal waters of the State.[43] Ever since 1915 these Fish and Game Districts have included all coastal waters within the three-mile belt along the entire coastline of the California coast. For example, District 19 was and is defined as:

> "The ocean waters and tidelands to high water mark not included in other districts, lying between the common boundaries of Santa Barbara and Ventura Counties and the southern boundary of San Diego County, excepting therefrom District 19A, and including all islands and the waters adjacent thereto lying off the coast of Southern California, south of a line extending due west into the Pacific Ocean from the north boundary of Santa Barbara County, excluding Santa Catalina Island and State waters adjacent thereto."[44]

Another example is District 20A, which is defined as

> "The State waters lying around Santa Catalina Island not included in District 20."[45]

The California statute has prohibited any person from possessing in said Districts 20 and 20A any net other

---

[43]Cal. Stats. 1915, p. 589; Cal. Stats. 1917, pp. 1047-1061; Cal. Stats. 1919, p. 428; Cal. Stats. 1921, pp. 195, 272; Cal. Stats. 1925, p. 793; Cal. Stats. 1929, p. 1182. In 1933 these districts were set out in the California Fish and Game Code, Sections 61-118.5. Cal. Stats. 1933, Chapter 773.

[44]Cal. Stats. 1915, p. 593, Chap. 379, Sec. 20; Cal. Stats. 1917, p. 1060, Chap. 643, Secs. 46, 55; Fish and Game Code, Sec. 87.

[45]Fish and Game Code, Sec. 90; Cal. Stats. 1917, p. 1061, Chap. 643, Sec. 48.

than a dip net for taking fish to be used as bait.[46] This statute has been enforced by the State authorities in the waters of the Pacific Ocean surrounding Santa Catalina Island,[47] as well as in the other waters of the State within the three-mile belt.

(iv) In 1917 the Legislature enacted a statute declaring

> "that the ownership and title to all fish found in the waters under the jurisdiction of the State are in the State of California"

and prohibiting the taking of any fish except by a person who thereby consents

> "that the title to such fish shall be and remain in the State of California for the purpose of regulating and controlling the use and disposition of same,"

requiring all fishermen in the business to pay a statutory license fee to the State. This statute provided for the establishment of maximum prices to be paid to the fisherman, wholesaler and retailer, and also established a fish exchange for the buying, selling and exchange of fish by the State. This statute has been enforced by the State authorities against fishermen operating in the Pacific Ocean.[48]

---

[46]Penal Code, Sec. 636, as amended by July 22, 1919; Cal. Stats. 1919, pp. 422-423.

[47]This statute was enforced against fishermen taking fish with nets within three miles around Santa Catalina Island. *In re Marincovich* (1920), 48 Cal. App. 474; *Suttori v. Peckham* (1920), 48 Cal. App. 88.

[48]Act approved June 1, 1917, Cal. Stats. 1917, p. 1673. *Paladini v. Superior Court* (1918), 178 Cal. 369.

(v) The State has regulated the operation of reduction plants for the manufacture of fish meal, fish oil, and fertilizer, except under license from the State Fish and Game Commission, which regulation has been enforced by the State officials against fishermen operating in the coastal waters of the State.[49]

(g) Leasing of Kelp Beds.

In 1917 the Legislature enacted a statute regulating the harvesting of kelp in State waters, requiring every person engaged therein to obtain a license from the State and pay a license fee therefor. This statute also provided for leasing kelp beds in State waters in areas not to exceed twenty-five square miles for periods of not exceeding fifteen years and to pay rental therefor of not less than 3¢ per ton for all kelp harvested from such beds, with a minimum payment of $40 per square mile per year.[50]

This kelp industry and California statute were reported to Congress in 1914 and later, but it acquiesced in Cali-

---

[49]Cal. Stats. 1919, p. 1204; Cal. Stats. 1921, p. 459; Cal. Stats. 1929, p. 901; Cal. Stats. 1933, pp. 394, 484; California Fish and Game Code, Secs. 1010, 1060, 1064; *People v. Stafford Packing Co.* (1924), 193 Cal. 719; *People v. Monterey Fish Products Co.* (1925), 195 Cal. 548; *Ocean Industries, Inc. v. Greene* (D. C. Cal. 1926), 15 F. (2d) 862; *Ocean Industries, Inc. v. Superior Court* (1927), 200 Cal. 235; *Bayside Fish Flour Co. v. Zellerbach* (1932), 124 Cal. App. 564; *Bayside Fish Flour Co. v. Gentry* (1936), 297 U. S. 422; *Santa Cruz Oil Corp. v. Milnor* (1942), 55 Cal. App. (2d) 56; *Mirkovich v. Milnor* (D. C. Cal.), 34 Fed. Supp. 409.

[50]Cal. Stats. 1917, p. 646, Chap. 513, Secs. 3-10. Fish and Game Code, Secs. 580-589. Cal. Stats. 1921, p. 470, Chap. 343, Secs. 1-4. Fish and Game Code, Secs. 590-594.

fornia's ownership and regulation as shown in the next chapter of this Brief, Appendix G on "Acquiescence," pp. 152-155.

A very substantial kelp harvesting industry has grown up in the coastal waters of Southern California since enactment of this 1917 statute. This industry operates entirely in the open coastal waters of the Pacific Ocean from the international boundary with Mexico as far north as Point Conception, involving approximately 20% to 25% of the entire California coast. The official map issued by the Division of Fish and Game of the State of California sets forth the area and location of 45 kelp beds. These beds range from 12½ square miles down to a fraction of one square mile in area. Thirteen of these 45 kelp bed areas are located in the vicinity of the 8 channel islands lying off the coast of Southern California and within the legal boundaries of the State. The other 32 kelp beds lie off the coast of California in the open sea, distances of approximately one mile from low water mark. A copy of the official kelp bed map issued by the Division of Fish and Game which dates back to the year 1931 is set forth in the Brief, page 147.

Commencing in July 1917, when harvesting of kelp was started in California, 174,024 tons of kelp were harvested in the kelp bed areas delineated on the said official map between the international boundary line with Mexico and Point Conception on the north by 16 operators acting under State permits or leases during the balance of the year 1917. In the year 1918, 438,956 tons were harvested by 20 operators in these California beds. In 1919

there were 13,043 tons of kelp harvested by two companies. Kelp bed operations were at a standstill from March 1919 until the year 1932.

On December 5, 1931, The Kelco Company entered into a lease with the State of California for 24.32 square miles of kelp beds, consisting of beds Nos. 2, 3, 4, the west half of 20, 21, the west half of 24, 25, 28, 30, 31, the west half of 33, the west half of 34, and 35. This lease was in existence until 1937, at which time it was canceled and a new lease was entered into between the same company and the State on April 5, 1937, covering 24.95 square miles of substantially the same kelp beds. This lease was for a term of 15 years at an annual minimum rental of $40 per square mile; plus additional rental of 3¢ per ton if the yearly tonnage harvested at 3¢ per ton exceeded $40 per square mile. Three other similar kelp leases are presently in effect.[51]

In addition to the above-mentioned kelp bed leases, operators have been and are now harvesting kelp from open beds under license from the State. The license fee charged by the State for harvesting kelp in open beds up to the summer of 1941 was 1½¢ per ton. In the 1941 ses-

---

[51]On March 1, 1932, Philip R. Park, Inc., entered into a lease with the State of California for a term of 15 years covering 7.09 square miles, including beds Nos. 11, 12, 13, 14 and 43.

On November 1, 1932, Michael J. Walsh entered into a lease with the State of California for a period of 15 years covering 1.32 square miles, covering bed No. 1.

There are presently two additional leases for harvesting small amounts of kelp or seaweed.

sion of the Legislature, this license charge was raised to 5¢ per ton for kelp harvested in open beds.

A substantial tonnage of kelp has been harvested each year for the years 1932 to 1945 (in addition to harvesting in earlier years as above mentioned).[52]

---

[52]The tonnage of kelp harvested from leased beds and open beds in the official kelp bed areas shown on the official map above set forth for the years 1932 to 1945 are as follows:

Year	Leased Beds	Open Beds
1932	10,013 tons	302 tons
1933	21,617 "	——
1934	14,057 "	1,827 "
1935	30,605 "	——
1936	34,827 "	14,065 "
1937	33,747 "	7,910 "
1938	29,419 "	18,287 "
1939	31,193 "	25,546 "
1940	25,690 "	33,320 "
1941	21,513 "	34,204 "
1942	17,091 "	45,211 "
1943	28,087 "	19,881 "
1944	31,562 "	21,473 "
1945	37,542 "	21,641 "
Totals	366,963 tons	243,667 tons
	Leased Beds	366,963 tons
	Open Beds	243,667 tons
	Grand Total	610,630 tons

The foregoing leases, licenses and statistics are a part of the public and official records of the Fish and Game Commission of the State of California, of which this Court may take judicial notice.

(h) STATE AND COUNTY BOUNDARIES COVER ENTIRE 3-MILE BELT—EXERCISE OF STATE'S JURISDICTION AND SOVEREIGNTY.

In its 1849 Constitution, adopted in the year prior to its admission into the Union, California's boundary was fixed so as to include the entire 3-mile belt, in this language:

> "The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line [between the United States and Mexico] to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast, to the forty-second degree of north latitude [the northerly boundary line of California]; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors and bays along and adjacent to the coast."[53]

This 1849 Constitution with the boundaries thus fixed was approved by Act of Congress of September 9, 1850, admitting California into the Union, wherein it is recited that:

> "Whereas the people of California have presented a Constitution and asked admission to the Union, which Constitution was submitted to Congress by the President . . . and which, on due examination, is found to be republican in its form of government: . . ."[54]

---

[53]Article XII, Section 1, 1849 Constitution.
[54]9 U. S. Stats. 452.

The 1879 Constitution of California, Article XXI, Section 1, continues the boundary of California in substantially the same language as above quoted.

The boundaries of the coastal counties of California extend out to the 3-mile limit as fixed by Acts of its Legislature enacted in the year 1872 and as therein set forth in Sections 3902 et seq. of the Political Code.[55]

3. Expenditures of Capital and Labor By State and Its Grantees, Lessees, Licensees.

One example among many others that exist is the expenditures made by the City of Santa Barbara. In 1925 the State granted to the City of Santa Barbara all tidelands and submerged lands in the Pacific Ocean lying in front of the City, later extending the grant out to the City boundaries.[56] The ocean boundary of the City of Santa Barbara extended to a point one-half mile from the shore and thence along the entire City front.[57] Commencing in the year 1926, the City of Santa Barbara constructed a breakwater extending northwesterly into the Ocean many hundreds of feet. This breakwater was completed in the year 1929 at an approximate original cost to the taxpayers of said City in the sum of $750,000.[58]

The City of Long Beach furnishes another example of a municipality expending many millions of dollars of its taxpayers' moneys in making improvements on and over the submerged lands of the Pacific Ocean lying in front

---

[55]Appendix to Answer, pp. 83-87.

[56]Cal. Stats. 1925, p. 181; Cal. Stats. 1937, p. 73. Appendix to Answer, pp. 322-323.

[57]Appendix to Answer, pp. 321-322.

[58]Appendix to Answer. p. 324.

of it granted to it by the State of California. The details of these vast expenditures by the City of Long Beach are set forth in the Appendix to Answer (pp. 186-203).

Many additional instances of large expenditures by the municipal grantees for improvements upon their respective submerged lands granted to them by the State of California are set forth in the Appendix to Answer.[59]

Expenditures running into very large sums have been made by lessees and licensees from the State in construction of wharves, piers, islands, groins, sea-walls, bulkheads, oil wells and the like, as shown above.

II.

Cases Cited by Counsel for Plaintiff Are Not in Point.

Counsel for plaintiff have stated (Br. p. 66) that: "Title could not have passed by prescription since there is no such right against the United States," and have cited five decisions in support thereof. This same argument is made by counsel for plaintiff (Br. p. 216), there citing four additional cases. A reading of each of these cases readily discloses that none of them involved a controversy between two States or between a State and the United States; but each one involved a suit in which a private individual was asserting a prescriptive title against the United States.[61]

---

[59]Appendix to Answer, pp. 754-756; pp. 234-283.

[61]The cases cited by plaintiff on this point are as follows: *Oaksmith's Lessee v. Johnston* (1875), 92 U. S. 343, 347, involved an ejectment action in which both parties admitted that the original title was in the United States. Plaintiff relied upon evi-

Counsel for plaintiff further assert (Br. p. 216) that, similarly, statutes of limitations, except as expressly prescribed by the Congress, have no application to proceedings instituted by the United States, citing seven decisions, each of which, however, involved a private individual or private corporation asserting the statute of limitations against the United States. None of these decisions involved a controversy between two States or between

---

dence of title arising from exclusive possession by his lessor and parties through whom he claimed, which possession took place during a time while title remained in the United States. Plaintiff and the parties through whom he claimed were all private individuals.

In *Jordan* v. *Barrett* (1846), 4 How. 168, 184, plaintiff, a private individual, claimed title by adverse possession for a period of ten years during a time when the lands were owned by the United States as a part of the public domain. Plaintiff claimed as against defendant, a grantee from the United States.

Burgess v. *Gray* (1853), 16 How. 48, 64. Suit to establish title in plaintiff, a private individual, who claimed to have been in actual possession of the land for many years but during a period when the legal title to the land was vested in the United States.

Gibson v. *Chouteau* (1871), 13 Wall. 92, 99. Ejectment by plaintiff, successor in interest to a United States patentee, with the defendants, private individuals, asserting ownership by reason of possession of the premises for more than ten years and while title remained in the United States.

Morrow v. *Whitney* (1877), 95 U. S. 551, 557. Ejectment brought by plaintiff deraigning title to the premises from a United States patentee, with defendant, a private individual, claiming adverse possession during a period while title remained in the United States.

Sparks v. *Pierce* (1885), 115 U. S. 408, 413. Action for possession by plaintiffs who derived title under a United States patent, with defendants asserting adverse possession during a period while title remained in the United States.

Hays v. *United States* (1899), 175 U. S. 248, 260, being an appeal from a rejection by the Court of Private Land Claims for New Mexico of appellant's (a private individual) petition for confirmation of a Mexican grant in which petitioner relied upon actual possession subsequent to the Treaty of Guadalupe Hidalgo during a time when title was vested in the United States if the Mexican grant was invalid.

a State and the United States.[92] Indeed, one of the cases cited by counsel, *Guaranty Trust Company v. United*

Northern Pacific R. R. Co. v. McComas (1919), 250 U. S. 387, 391. A quiet title suit by plaintiff McComas claiming adverse possession of the premises for ten years, during which time patents were outstanding in the name of the railroad company, which patents had been erroneously issued, and hence title remained in the United States during plaintiff's possession, with reconveyances being delivered by the railroad company to the United States pending this suit.

[92]*United States v. Nashvile etc. R. R. Co.* (1886), 118 U. S. 120, 125, was suit by United States to recover interest payable on bonds executed by defendant railroad company.

United States v. Knight (1840), 14 Pet. 301, 315, was an action of debt by the United States against defendants, private individuals, on a bail bond.

United States v. Thompson (1878), 98 U. S. 486, 489, was a suit by the United States against defendants, Superintendent of Indian Affairs of Maine and his sureties on his official bond.

United States v. Schwalby (1893), 147 U. S. 508, 415-515, was an action of trespass brought by plaintiff, a private individual, to try title to a parcel of land which was a part of a military reservation of the United States, being in charge of defendants who were the military commanders of the reservation. Plaintiff deraigned title from a private individual who was the common source of title. Defendant officers claimed title in the United States as purchasers from this same source of title. Defendant officers set up the plea of the Texas statute of limitations against plaintiff's private claim. The Court held that the officers of the United States were entitled on behalf of the United States to assert the benefit of the statute of limitations although the United States would not be bound when such statute was sought to be enforced against it.

Davis v. Corona Coal (1924), 265 U. S. 219, 222, 223, was an action for damages brought by the Director General of Railroads as agent of the United States, as a result of acts of defendant, a private corporation, injuring a railroad wharf while it was under federal control; the defendant corporation pleading the state statute of limitations.

Guaranty Trust Co. v. United States (1938), 304 U. S. 126, 132-133, involved a suit by the United States as assignee of the Russian Soviet Government to recover monies deposited by the Provisional Russian Government with Guaranty Trust Company of New York *in which the Court held the New York statute of limitations did apply against the United States to bar recovery in this suit.*

United States v. Summerlin (1940), 310 U. S. 414-416, involved a claim of the Federal Housing Administrator, acting on

States, 304 U. S. 126, squarely holds against plaintiff and applies the New York statute of limitations against the United States as assignee of the Russian government and enforces one of the several recognized exceptions to the general rule of prescription not running against the Government.[63]

Counsel for plaintiff make the further assertion (Br. p. 217) "that the State's position [that prescription vests title in the State] is not supported by . . . *Rhode Island v. Massachusetts,* 4 How. 591; *Indiana v. Kentucky,* 136 U. S. 479, or *Arkansas v. Tennessee,* 310 U. S. 563." Counsel argue that all these cases involved disputes as to the locations of the boundary lines between States and are distinguishable from the present controversy for that reason. Counsel there argue that the area involved in this proceeding is well within the boundary of California and of the United States, and the issue here is "one of rights to property within that area." We submit, however, that there is no basic ground for distinguishing the three State controversy cases last mentioned, nor any of the cases on which we have hereinabove relied which govern in controversies between two States or between a State

---

behalf of the United States, filed with the personal representative of decedent's estate beyond the time allowed by the State statute for filing creditors' claims.

[63]*Guaranty Trust Company v. United States* (1938), 304 U. S. 126, at 134-135, states the exception to the rule, which exception was applied in that case as follows:

> "* * * As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy *generated by the nature of the suitor or of the claim which it asserts.* That this is the guiding principle sufficiently appears in the many instances in which *courts have narrowly restricted the application of the rule nullum tempus* in the case of the domestic sovereign."

and the United States. *First,* there is no real distinction between a suit seeking to establish a boundary between States, and the present case, since in each instance an adjudication results in the establishment of title to the area in question being vested in either plaintiff or defendant. As clearly evidencing the lack of any real difference between a suit to determine a boundary between a State and the United States, and the instant case in which the United States claims the ownership of not less than 1,920,000 acres within the boundaries of California we find *United States v. Texas* (1892), 143 U. S. 621. In that case, pursuant to specific authorization of Congress, the Attorney General filed a suit to determine the boundary between the United States and the State of Texas, and also to adjudicate the title to Greer County as between the United States and the State. In the complaint filed by the Attorney General in that proceeding it was alleged that the land in question contained the specific area of 1,511,576.17 acres (p. 637). In a later step in that same proceeding this Court held the closely related doctrine of acquiescence applicable as between the State and the United States. (*United States v. Texas* (1895), 162 U. S. 1, 60-61.) *Secondly,* the governing line of authorities which we have above set forth establishes that the doctrine of prescription applies in suits between Nations, which rule has been adopted by this Court in controversies between States, as well as in controversies between a State and the United States; and no limitation of this doctrine to mere boundary suits is found in the cases.

Counsel for plaintiff make the final assertion (Br. p. 214) that the doctrine of prescription does not apply to this proceeding because, they say, "this is not a controversy

between equals." The only authority cited by counsel for this proposition is *Sanitary District of Chicago v. United States* (1925), 266 U. S. 405, 425. That case had nothing to do with the question of prescription. The quoted statement that the controversy was not "between equals" was made by the court in establishing the proposition that "The United States is asserting its sovereign power to regulate commerce and to control navigable waters within its jurisdiction" and also in "carrying out treaty obligations to a foreign power." That is an entirely different and extraneous proposition to the one involved in this case. There is nothing unequal in the position of plaintiff and defendant in this controversy where each asserts the ownership of approximately three thousand square miles of submerged lands lying along the coast of defendant State. There is therefore nothing to this point.

BLANK
PAGE

BLANK
PAGE

APPENDIX G.

Acquiescence.

(Second Affirmative Defense)

(I)

Policy of Congress.

It has been a fixed *policy* of Congress over many decades to honor the rule of property that title and ownership of all tide and submerged lands within the borders of a State belong to the State and not to the United States. Congress has never, to this day, altered that policy. This suit was filed in utter disregard of that Congressional policy.

1. *Policy as to Territories:* An affirmative declaration of this policy is contained in an Act of Congress of May 14, 1898, extending the Homestead laws to the Territory of Alaska (30 Stats. 409), in which it was declared as follows:

> "That nothing in this Act contained shall be construed as impairing in any degree the *title of any State* that may hereafter be erected out of said District, or any part thereof, to tide lands and *beds of any of its navigable waters,* or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, *it being declared* that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said district. *The term 'navigable waters,' as herein used, shall be held to include all*

tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark."[1]

2. *General Congressional Policy:* Congress has always refrained from any attempt to dispose of the navigable waters and the soils thereunder in the respective States. It has never extended its public land surveys below ordinary high-water mark bordering navigable waters, whether "inland" or on the open coast. This policy has been commented on by the Court and other courts on numerous occasions.[2]

---

[1] *Re Logan* (1900), 29 L. D. 395, 397, where the Secretary of the Interior, in an opinion evidently prepared by the then Assistant Attorney General (later Mr. Justice) Willis Van Devanter, after quoting the above portion of the Act of Congress of May 14, 1898, stated:

> "This legislative declaration is in entire harmony with the law as it had been previously announced by the Supreme Court [in *Shively v. Bowlby*, 152 U. S. 1, 58] and is indicative of a *purpose on the part of the Congress*, in dealing with the District of Alaska, to adhere to the *policy* theretofore existing . . ."

[2] In *United States v. Holt State Bank* (1926), 270 U. S. 49, 55, the Court states that:

> ". . . the United States early adopted and constantly has adhered to the *policy* of regarding *lands under navigable waters* in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances . . ."

Shively v. Bowlby (1894), 152 U. S. 1, 43, 48—"settled policy";

Mann v. Tacoma Land Company (1894), 153 U. S. 273, 284—"the whole policy";

Illinois Central Railroad v. Illinois (1892), 146 U. S. 387, 452;

Morris v. United States (1899), 174 U. S. 196, 237;

Scott v. Carew (1905), 196 U. S. 100, 111;

Borax Consolidated v. Los Angeles (1935), 296 U. S. 10, 17;

3. *Illustrated by Treatment of State of Washington Constitution:* This policy of Congress is further typified by its Act of February 22, 1889, providing for the admission of Washington into the Union (25 Stats. 676) and the proclamation of the President of the United States thereunder approving the Constitution of the State of Washington, presented to Congress in obtaining admission to statehood. In Article XVII, Section 1, of said Constitution, it is provided as follows:

> "§1. DECLARATION OF STATE OWNERSHIP.—The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this secton shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

The boundary of Washington is fixed, in its Constitution, as extending

> *"in the Pacific Ocean one marine league."*

Alaska Gold Mining Co. v. Barbridge (D. C. Alaska. 1901), 1 Alaska 311, 315—"the Policy of our Government";
Heine v. Roth (D. C. Alaska, 1905), 2 Alaska 416, 424—"The Policy of the United States";
Re Logan (1900), 29 L. D. 395. 397;
2 *Lindley, Mines* (3rd Edition, 1914), pp. 1015-1016;
Patton on Titles (1938), p. 577;
45 *C. J.* p. 557;
United States v. Ashton, 170 Fed. 509, 513.

This was a clear recognition by Congress of Washington's ownership of all lands under all navigable waters extending out to the 3-mile limit of the Pacific Ocean.[3]

4. *Illustrated by Kelp-Bed Legislation:* Under a 1910 appropriation of Congress,[4] the Bureau of Soils, United States Department of Agriculture caused an extensive investigation to be made of the potash resources found in the kelp or seaweed beds along the Pacific coast. Congress was notified in the Bureau's report of 1911[5] of the importance of the kelp bed resources of the Pacific coast in this language:

> "The most promising source of potash in the United States is the beds of seaweed or kelp groves along the Pacific coast."[6]

The report estimated that the Pacific kelps

> "can easily be made to yield upward of 1,000,000 tons of potassium chloride annually, worth at least $35,000,000, and that the cost of production can largely, if not entirely, be covered by the value of the iodine and other minor products."[7]

---

[3]In 1894 this Court made specific reference to Article XVII, Section 1, of the Constitution of the State of Washington, and the Act of Congress of February 22, 1889, admitting Washington to statehood. *Mann v. Tacoma Land Company* (1894), 153 U. S. 273, 284. It was again specifically noticed in 1921 in an opinion of Mr. Justice Brandeis for a unanimous court in *Port of Seattle v. Oregon and Washington Railroad Company* (1921), 255 U. S. 56, 63.

[4]Sen. Doc. 190, 62nd Cong., 2d Sess., p. 17.

[5]Senate Document 190, 62nd Congress, 2nd Session, transmitted by President Taft to the Senate and House of Representatives of Congress on December 18, 1911.

[6]Senate Document No. 190, *supra*, page 40; also pages 6, 7, 19.

[7]Senate Document No. 190, *supra*, page 44.

The report recommended to Congress that it give immediate attention to the question of supervising, leasing and policing these kelp groves.

The Department was uncertain as to whether the Federal or the State Government had jurisdiction over these kelp beds which exist within the three-mile limit. Accordingly, the Department requested a legal opinion of its Solicitor.[8] *Its Solicitor rendered a written opinion on October 12, 1911, that the State and not the Federal Government had the right to regulate the taking of kelp within the 3-mile limit.*[9] In the body of the report of the Department thus transmitted to Congress, *the opinion of the Solicitor* that the State and not the Federal Government had jurisdiction to regulate the taking of the kelp within the 3-mile limit *was called to the particular attention of Congress.*[10]

Congress has never attempted to lease or in any way regulate the taking of the kelp from the 3-mile belt off

---

[8]Letter of October 5, 1911, from the Department to its Solicitor. Senate Document 190, *supra*, Appendix I, page 129.

[9]On October 12, 1911, the Solicitor of the Department of Agriculture rendered his opinion, stating, in part, that:

> "Jurisdiction over the shores of the sea below the line of high tide and for a distance of 1 marine league or 3 geographical miles out to sea from the line of low water *is wholly within the respective States*, subject to the paramount right of the Federal Government to regulate commerce and navigation, while the sea beyond the 3-mile limit is open to all the nations. Bays, whose headlands run more than 6 miles apart, measuring from low water, are subject to the same extent to the jurisdiction of the State within which they lie. *The right to regulate the taking of kelp within the limits above described is therefore within the several States*, while neither the State nor the Federal Government has any control over the water beyond that limit." Senate Document 190, *supra*, Appendix I, page 129.

[10]Senate Document No. 190, *supra*, page 43.

the coast of California or elsewhere. Congress appropriated funds to construct and operate a test plant at Summerland, California, to develop processes for the extraction of potash from the kelp.[11] Yet no Act of Congress was ever adopted for the leasing or other regulation of harvesting kelp from the Pacific. Yet, in 1915 the Agriculture Department again called attention to the need for such legislation in order to foster the commercial development of the potash industry,[12] and this 1915 report was printed and published with accompanying maps *pursuant to appropriations made by Congress for that purpose.*[13]

On the other hand, several of the States as long as 30 years ago, enacted legislation for State leasing of the kelp beds. California and Oregon enacted Kelp Bed Leasing Laws in 1917.[14] Indeed, the pendency of proposed legislation for leasing these kelp beds in California was reported by the Department of Agriculture in the publica-

---

[11]The United State Department of Agriculture, Department Bulletin No. 1191, dated December, 1923, entitled "Potash from Kelp," by R. P. Brandt and J. W. Turrentine, page i.

Act of March 4, 1911, 36 Stats. 1235, 1236; Act of June 30, 1913, 37 Stats. 269, 290; Act of March 4, 1913, 37 Stats. 828, 845; 38 Stats. 432, 442; 38 Stats. 1103; Act of June 3, 1916, 39 Stats. 215, Section 124, 39 Stats. 464, 465, 1153.

[12]United States Department of Agriculture Report No. 100, "Potash from Kelp," by Frank K. Cameron, issued April 10, 1915, pages 29-30.

[13]United States Department of Agriculture Report No. 100, "Potash from Kelp," by Frank K. Cameron, issued April 10, 1915, p. 1.

[14]Cal. Stats. 1917, page 646; Fish and Game Code, Sections 580-589. Cal. Stats. 1921, page 470; Fish and Game Code, Sections 590-594. 1917 Laws of Oregon, Chapter 276, page 516; 1920 Laws of Oregon, Title 32, Chapter 10, Section 5659, Volume II, page 2302. Appendix to Answer, page 586.

tion authorized to be published and printed by appropriation of Congress in 1915.[16]

The State of California has executed numerous leases of kelp beds in the 3-mile belt of the Pacific coast under its 1917 kelp leasing legislation. These California coastal water kelp beds were many years ago mapped by its Fish and Game Commission and cover an area of approximately 100 square miles of submerged lands lying mainly within an area from one-quarter of a mile to a mile offshore. The details are discussed in the Chapter on Prescription, Brief, p. 147, Appendix F, pp. 137-140.

Thus we find intentional nonaction on the part of Congress for the last 35 years in refraining from making any claim to the ownership of a public resource which is the basis of a large industry estimated in 1911 by its own Department of Agriculture to have a value of $35,000,000 annually—of comparable value to the State's offshore oil industry.

On the other hand, we find affirmative and continued ownership of these offshore kelp beds asserted by the State for the last 30 years.

Other States have acted similarly in asserting ownership, possessing and leasing kelp beds within their coastal waters.[17]

5. *Illustrated by Off-Shore Petroleum:* In the last 25 years, California has asserted its ownership by legis-

---

[16]United States Department of Agriculture report of April 10, 1915, "Potash from Kelp," by Frank K. Cameron.

[17]1917 Laws of Oregon, Ch. 276, p. 516; 1920 Laws of Oregon, Title 32, Ch. 10, Sec. 5659, Vol. II, p. 2302. 1937 Maine Laws; Rev. Stats. Maine, 1944, Ch. I, Sec. 24. Maine Pub. L. 1945, Ch. 248.

lation fully covering the leasing and regulation of the exploration, drilling, developing and selling petroleum products from under the bed of its three-mile belt.[18] On the other hand, Congress has over all these years refrained from enacting any such legislation, although its attention has been called to the oil production operations under the coastal waters of California on several occasions. As early as 1907 the United States Department of the Interior caused an investigation to be made and a written report to be published pursuant to an appropriation of Congress entitled "Geology and Oil Resources of Summerland District, Santa Barbara County, California."[19] This report advised that development of oil drilling from wharves built over the ocean had commenced in 1899 and that 22 companies were operating in that year, and that in 1906 there were 189 producing wells in this Summerland submerged oil field. A map of the oil structure extending out into the ocean was set forth in Bulletin No. 321.[20] While Congress did nothing concerning the Summerland submerged oil field, the State of California in 1923 passed express legislation for the leasing and regulation of the Summerland submerged oil field.[21] The State of California has ever since that date leased to individuals portions of the Summerland submerged oil

---

[18]Cal. Stats. 1921, Chapter 303, page 404; Cal. Stats. 1923, page 593; Cal. Stats. 1929, page 11; Cal. Stats. 1925, page 944; Cal. Stats. 1931, page 86; Cal. Stats. 1933, page 1523; Cal. Stats. Ex. Sess. 1938, Chapter 5, page 23; Cal. Stats. 1941, page 1902. See detailed discussion in chapter entitled "Prescription," Appendix F, *supra*, pp. 124-131.

[19]Bulletin No. 321 of the Department of Interior, United States Geological Survey (Government Printing Office, 1907).

[20]Appendix to Answer, pages 759-760.

[21]Cal. Stats. 1923, page 593. Appendix to Answer, pages 757-760.

field and has received and is now receiving rental therefrom.

The California leasing of offshore oil deposits was called to the attention of Congress in 1939 through the Committee on Public Lands and Surveys of the United States Senate, 76th Congress, 1st Session. This same Committee of Congress was also fully advised of the program of the City of Long Beach, as grantee of the State of California of the tide and submerged lands within its municipal boundaries, for drilling and producing petroleum from underneath the submerged lands within the 3-mile belt forming a part of the City of Long Beach. The City Attorney of Long Beach made a statement to this Committee of Long Beach's ownership of all tide and submerged lands within its boundaries; of the basis of the City's title having been deraigned from the State of California, the owner thereof by virtue of its sovereignty; of the development for oil and gas purposes of the tide and submerged lands under its Charter provisions requiring all revenues therefrom to be deposited in the Harbor Revenue Fund and to be used exclusively for harbor purposes; of the expenditures that had been made over the years by the City in the development of its Outer Harbor; and of the numerous recognitions by the United States, through its various branches, departments and agencies that the City owned the tide and submerged lands within its boundaries extending three miles out into the Pacific Ocean.[22] Notwithstanding, Congress did not adopt resolutions to change its long-established policy.

---

[22]Hearings before Committee on Public Lands and Surveys, United States Senate, 76th Congress, 1st Session, S. J. Res. 83 and S. J. Res. 92, of March 27-30, 1939, pages 281-330. Appendix to Answer, pages 220-221.

Other coastal States have for years had oil and gas laws authorizing State leases of submerged lands in the marginal sea: For example, Louisiana has had such a law since 1910;[23] and Texas since 1913.[24] Many oil and gas leases have been executed by these States of lands under the bed of the marginal sea. This leasing of the marginal sea by these States was directed to the attention of the same Public Lands Committee of the Senate in 1939 and again in 1945.[25]

6. *Illustrated by Sponge Industry:* The sponge industry obtains its raw material from the bed of the marginal sea of Florida and of the high sea beyond. Legislation was adopted by the State of Florida regulating the taking of sponges except by authorized means and of certain sizes. Congress also enacted legislation in 1906 regulating the landing, delivery, cure and sale of sponges from the waters of the Gulf of Mexico or the Straits of Florida without specifically excluding the marginal sea within the boundaries of the State of Florida. In the *Abby Dodge*, 223 U. S. 166, this Court in 1912 held that the taking of sponges from the marginal sea within the boundaries of Florida was not the subject of Congressional action. The Court there reversed a judgment forfeiting a vessel under said Act of Congress and held that the libel must negative the fact that the sponges may have been

---

[23]Appendix to Answer, pp. 608-611.

[24]Appendix to Answer, pp. 595-6.

[25]Hearings before Comm. of Pub. Lands & Surveys, *supra*, Note 22.

taken from waters within the boundaries of the State of Florida; and that in order to state a cause of action the libel must allege and the facts must prove that the sponges were taken *outside and beyond the territorial limits of the State*. This Court placed its decision in the *Abby Dodge* on the ground that the State owned the bed of its marginal sea, owned the sponges growing on the bed of its marginal sea, and therefore the State alone had the jurisdiction to regulate its own property; and that Congress had no power or jurisdiction over such State property.

Thereafter Congress amended its Sponge Act, having before it the *Abby Dodge* decision which was specially called to its attention in passing its Act of August 15, 1914.[29] In Section 1 and Section 2 of the Act, Congress carefully limited this legislation to the taking or catching of sponges in the waters of the Gulf of Mexico or the Straits of Florida *"outside of State territorial limits."*[30]

---

[29]38 Stats. 692, 16 U. S. C. A., Section 781.

[30]The origin of the phrase "outside of State territorial limits" contained in the Act of August 15, 1914, is found in a letter from the Department of Commerce and Labor dated April 30, 1912, addressed to the Chairman of the Committee on Fisheries, United States Senate, analyzing and recommending the addition of the quoted phrase to Senate Bill No. 6385 of the 62nd Congress, saying that:

> "This bill has been carefully considered by the Department and the following minor alterations in its text are recommended:
>
> "On line 9, page 1, after the word 'Florida', insert the words *'outside of State territorial limits'*. Although the omission of these words would not necessarily make the act unconstitutional, as the Supreme Court would undoubtedly construe the act as referring to waters outside of State territorial limits, *as it did in construing the Act of June 20, 1906 [in the Abby Dodge]* 223 U. S. 166, the language of which is iden-

This was done for the obvious purpose of complying with the decision of this Court in the *Abby Dodge* case, *supra*.

7. Illustrated by Fishing Industry: The colonies, prior to 1776, regulated the fishing industry in their respective coastal waters and since the formation of the Union, the States have exercised exclusive jurisdiction over the fishing industry in their respective coastal waters.[31] The States have always asserted ownership of both free-swimming and sedentary fish within the boundaries of their coastal waters.

> "That this exclusive right of taking oysters in the waters of New Jersey is a right of property, vested either in certain individuals, or in the State, for the use of the citizens thereof; . . . "[32]

The States have been the exclusive source of the regulation, licensing and control of the fishing industry in the coastal waters, with the exception hereinafter mentioned.[33]

The Congress has never attempted to regulate any portion of the fishing industry within the coastal waters of

---

tical in this respect with the language of the bill in question; nevertheless these words should be inserted *and thus remove the necessity of construction*. A similar insertion is recommended on line 11, page 2."

Senate Report No. 904, 62nd Congress, 2nd Session, reporting Senate Bill No. 6385, which was revived in the 63rd Congress as Senate Bill No. 5313, which then became the Act of August 15, 1914. See Senate Report No. 488 of Senate Committee on Fisheries, 63rd Congress, 2nd Session.

[31]See *supra*, pp. 87, 90, 92, 98, 102.

[32]*Corfield v. Coryell* (1825), 4 Wash. C. C. 371, Federal Case No. 3230; *Smith v. Maryland* (1855), 18 How. 71, 75; *McCready v. Virginia* (1876), 94 U. S. 391, 394-395; *Manchester v. Massachusetts* (1890), 139 U. S. 240, 259; *Dunham v. Lamphere* (1851), 3 Gray 230. See cases cited in Appendix F on "Prescription," *supra*, pp. 132-133.

[33]See the California statutes and decisions on the ownership and regulation of fishing in the coastal waters of California, in the chapter on "Prescription," *supra*, pp. 131-137.

the several States, except where treaties have been entered into with foreign nations requiring implementation by Acts of Congress.[84]

8. *Illustrated by Acts of Congress Authorizing Exchanges of Submerged Lands in Pacific Ocean and Bay of San Pedro:* We discuss elsewhere (p. 186) the Act of Congress of July 25, 1912, authorizing the exchange of a 9.75-acre parcel of submerged lands adjoining Deadman's Island in the Pacific Ocean and Bay of San Pedro, including the specific declaration that the City of Los Angeles, as successor to the State, owned these submerged lands. We also discuss later (p. 187) the Act of Congress of March 3, 1925, authorizing the further exchange of a 61.98-acre parcel of submerged lands surrounding Deadman's Island, where Congress again declared the ownership of these submerged lands in the City of Los Angeles. We subsequently discuss (p. 216) the Act of Congress pursuant to which the two warranty deeds were

---

[84] *Tomasevich, "International Agreements on Conservation of Marine Resources"* (1943), pp. 21-23; 42 *et seq.* An example of a treaty on this subject is the "Convention Between The United States And Canada For The Preservation Of The Halibut Fisheries Of The Northern Pacific Ocean And Bering Sea, signed at Ottawa on January 29, 1937." Pursuant thereto Congress passed the Act of June 28, 1937, entitled "Northern Pacific Halibut Act of 1937" to carry out the treaty provisions with Canada with respect to the halibut industry. 16 U. S. C. A., Sections 761-769.

Another example is the Act of Congress of August 24, 1912, entitled "An Act to give effect to the Convention between the Governments of the United States, Great Britain, Japan and Russia for the preservation and protection of the fur seals and sea otters which frequent the waters of the North Pacific Ocean, concluded at Washington July 7, 1911." 16 U. S. C. A., Sections 632 *et seq.*

executed in 1934 by the City of Newport Beach conveying to the United States submerged lands which plaintiff concedes lie in the marginal sea.

Other examples of Congressional action recognizing the title to the submerged lands as being in the respective States might be mentioned, but what has been here mentioned is sufficient to show long recognition by Congress of State ownership of the submerged lands wherever located within the boundaries of the State.

9. *Congress Has Never Changed This Policy:* In fact, Congress has never changed its policy of recognizing State ownership of the submerged lands in coastal waters as well as in "inland waters." To the contrary, the affirmative action of the 79th Congress was to adopt a joint resolution formally asserting and declaring the State's ownership of the submerged lands in question, although this joint resolution, though adopted by a majority of both Houses of Congress, was vetoed by the President.[35]

10. *Plaintiff's Argument Against the Existence of This Policy Is Insubstantial:*

(a) *Congress' claimed inaction:* Counsel argues against the formidable array of evidence presented in the Brief of Congressional policy, by erroneously contending that it is based solely on

> "the fact that the Congress has never enacted legislation providing for the disposal of any tide or submerged lands";

---

[35]S. J. Res. 225, 79th Congress.

and counsel say that the fact Congress has not seen fit to convey away any interest in such lands

> "does not necessarily imply that it does not consider such lands to be owned by the United States, and it certainly does not constitute a positive recognition of title in another."

and counsel then refer to examples of non-action by Congress concerning mining and grazing on public lands in the western States.[36]

This contention is predicated *entirely* upon *assumed inactivity* of Congress, which assumption is not borne out by the facts. Congress has, in so many words, declared its policy of recognizing State ownership of all submerged lands within State boundaries. No more binding declaration could be found than that contained in the Act of Congress of May 14, 1898, with respect to the title to the beds of all navigable waters within the territory of Alaska, where Congress stated that it

> "declared that all such rights [to the beds of all navigable waters] shall continue to be held by the United States in trust for the people of any state or states which may hereafter be erected out of said District".[37]

Nor could any more positive and affirmative action be taken by Congress than that found in the Act of Admission of the State of Washington, approving the States constitution which contained a definite declaration that the State owned the beds of all navigable waters within its boundary and fixed its boundary as extending one

---

[36]Plaintiff's Brief, pages 185-189.

[37]Set forth in full, *supra*, pp. 149-150.

marine league into the Pacific Ocean.[38] Many other affirmative actions of Congress were sufficient for this Court and other judicial bodies to conclude, time after time, that Congress had adopted a "policy" on this subject.

(b) *Mining and grazing examples:* Counsel's reference to the inaction of Congress for some period of time concerning mining operations and stock grazing on the public lands in western States,[39] is very unimpressive. The miners, the cattle grazers and the sheepherders, prior to receiving Government patents, never denied the title and ownership of the United States to its public lands. In the cases cited by counsel, the Court merely held that the cattlemen, sheepherders and miners obtained, from their possession, "implied licenses," revocable at the will of the Government; and that these revocable licenses were qualified or restricted by subsequent Acts of Congress regulating grazing, fencing and mining on the public domain.[40]

The gist of the cases cited by counsel for plaintiff relative to the use of the public domain for mining and grazing purposes is stated by the Court in *Light v. United States* (1911), 220 U. S. 523, 535, where the Court in noting that the United States, without passing a statute on the

---

[38]Set forth in full, *supra*, page 151.

[39]Plaintiff's Brief, page 186.

[40]For example: *U. S. v. Grimaud* (1911), 220 U. S. 506, 521; *Light v. U. S.* (1911), 220 U. S. 523, 556.

subject, suffered its public domain to be used for grazing purposes, observed that:

> "There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. . . . Its failure to object, however, did not confer any vested right on the complainant [who had been grazing his livestock], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."

This "implied license", revocable at the will of Congress or the Executive, is the principle announced in each of the cases cited by counsel on the mining and grazing on the public domain. Being revocable at will, the title of the Government to the public domain was never brought into question by the temporary use acquiesced in by the Government. The underlying ownership of the Government in the public domain was never questioned by the miners or the cattlemen or sheepherders. Thus, the enclosure statutes, forest reserve laws, the regulations creating grazing districts and the Taylor Grazing Act of 1934 were simply proper exercises by Congress of the use and disposition of its conceded title to the public domain.

Hence, counsel's reference to the mining and grazing history is wholly meaningless in the instant case where we find title to the submerged lands in question having been declared by the Court and the Secretary and Department of the Interior and other departments of the Government to be owned by the State and not by the United States and, thus, an entirely different situation is presented.

(c) *1921 Offshore Leasing Statute:* Counsel seek to explain away the fact that Congress has never asserted

ownership in the United States of the marginal sea by arguing that

> "The matter has become one of major concern only in recent years"

and predicate this argument on the mistaken notion that although California enacted legislation in 1921 providing for leasing offshore oil lands, California did not, so counsel state, undertake to issue offshore leases generally until a much later date.[41] This argument is unsound because, as indicated elsewhere in this Brief,[42] a number of leases were issued by California within a matter of months after enactment of the 1921 statute. California has continuously since 1921 provided the conditions under which offshore leasing from the State may be undertaken.[43] But wholly apart from the oil leasing regulation by the State, Congress has known for decades, as shown above, that the coastal States claim to own the submerged lands in the marginal sea as well as in "inland waters."

---

[41]Plaintiff's Brief, pages 186-187.

[42]Data showing that California immediately upon enactment of this 1921 statute received applications and issued leases covering submerged lands in the Pacific Ocean and Santa Barbara Channel in the Summerland Oil Field, is set forth in the section on "Prescription," page 124.

[43]A history of the California offshore leasing legislation and the details of the leases issued by the State are set forth in Appendix to Answer, pages 756-799.

Plaintiff's Brief, page 187, conveys the erroneous impression that California did not have legislation authorizing or did not issue leases or other instruments for producing oil from submerged lands in the Pacific Ocean from 1929 to 1938. This is entirely untrue, as shown in the chapter on "Prescription," *supra*, page 127. There was legislation in 1933 under which the State entered into a large number of agreements for the production of oil and gas in the Huntington Beach Oil Field extending into the Pacific Ocean approximately one-third of a mile.

(d) *1938-1939 Proposed Congressional Joint Resolutions:* Counsel also leave the wrong impression that Congress took action in 1938 asserting ownership of submerged lands in the United States.[44] The fact is that not only did that proposal fail of passage in 1938, but in 1939 substantially the same joint resolution was proposed to Congress and it failed to receive any favorable action by either the Senate or the House. This 1939 proposal in Congress is not even mentioned in plaintiff's Brief.[45]

(e) *1946 Congressional Joint Resolution:* Counsel for plaintiff contend, after mentioning the joint resolution which passed both Houses of Congress in 1946 but was vetoed by the President, that Congressional concern over this subject for the past decade "indicates that any judgment with respect to Congressional action or inaction is wholly inconclusive."[46]

We submit that counsel's conclusion in this regard is entirely faulty since the action of Congress evidences absolute consistency over more than 100 years in refusing to disturb State's ownership of submerged lands both in the marginal sea and in bays, harbors, navigable rivers and lakes.

(f) *Act of Congress Declaring City of Los Angeles Owner of Submerged Lands:* Counsel's only explanation of the above-mentioned Acts of Congress dealing with

---

[44]Plaintiff's Brief, page 187, mentions that the Senate passed a joint resolution in 1937 asserting the rights of the United States in the submerged lands, and that this resolution was *not* acted upon by the House.

[45]See discussion of both the 1937-1938 and the 1939 proposed joint resolutions in Congress, *supra,* page 157.

[46]Plaintiff's Brief, page 188.

Deadman's Island in the Pacific Ocean and Bay of San Pedro is that

> "These measures relate to land situated in either a bay or a harbor."[48]

Counsel have fallen into inconsistent ways, since they here flatly treat the Pacific Ocean and Bay of San Pedro as a "bay," whereas in other parts of the Brief[49] they say they are in doubt as to whether this is a "true bay" or "open sea." If in other portions of the Brief counsel are "doubtful" as to San Pedro Bay being "open sea," then their assertion that these Acts of Congress relate to a "bay or harbor" at this place in the Brief is quite unsatisfactory. (The subject is discussed further in connection with City of Long Beach grants, *infra*, pp. 227-229). If as a result of this doubt on plaintiff's part counsel are reserving the future right to claim the submerged lands in the Bay of San Pedro, then by all means these Acts of Congress are of utmost significance.

11. *Summation of Congressional Policy:* It can be confidently asserted that Congress has for many decades maintained a policy of recognizing States' ownership of submerged lands, has never enacted legislation or passed resolutions asserting or questioning States ownership of submerged lands, has rejected relatively recent efforts of its officials who have sought to prevail on Congress to reverse this policy, and on the contrary, Congress has, by adopting the joint resolution of 1946, recently declared of record its continued adherence to this long-established policy.

---

[48]Plaintiff's Brief, pages 188-189.

[49]Plaintiff's Brief, App. B, p. 228.

(II)

Grants of Submerged Lands to the United States From the State of California.

There have been a number of grants from the State of California and the other coastal States to the United States, pursuant to requests of officials of the United States, of various portions of the submerged lands within the coastal waters of California and the other States.

Plaintiff concedes in its Brief[50] that 36 of the grants from California and the other coastal States to the United States involve lands under the "open sea", or involve lands the location of which, under plaintiff's theory, is "doubtful" as to whether it is in the "open sea" or in "inland waters." Actually there are about 50, rather than 36, of these transactions.

However, the Government seeks to minimize the effect of these grants by asserting that they are isolated cases and do not establish a uniform recognition on the part of the United States.[51]

The astonishing fact is that counsel for plaintiff have failed to produce even a single instance of a claim of ownership having been asserted *on behalf of the United States* to any portion of the coastal waters of any State prior to the filing of the action which was dismissed when this proceeding was filed.

The answer to this minimizing attempt of counsel for plaintiff is that the State does not claim that every instance of all individual grants of submerged lands from the State of California or from the other coastal States to the

---

[50]Plaintiff's Brief, pp. 167-169.

[51]Plaintiff's Brief, pages 166-182.

United States were even attempted to be set forth in the Appendix to the Answer. The State merely furnished the Court and counsel with some instances of these grants to show that on a number of occasions over a period of many decades the various branches and departments of the United States have all uniformly recognized and acquiesced in this established rule of property.

Counsel for plaintiff infer that it is necessary to cumulate a vast number of instances of these grants being requested by the United States and being executed by the States before recognition and acquiescence may set in. In this, counsel for plaintiff are in error, we respectfully submit. A sufficient number of examples of grants of substantial areas of submerged lands in the coastal waters of California and in the other coastal States are presented in the Appendix to Answer to establish a uniform course of recognition and acquiescence. It will be seen that areas ranging from a part of an acre to hundreds of acres of submerged lands in the open sea are involved in the instances hereinafter discussed.

Also, counsel for plaintiff, seeking to minimize the cumulative force and effect of these numerous grants from the States to the United States, tell us that, after analyzing 195 instances of such grants found in the Appendix to Answer, there are 159 within so-called "inland" waters; and that of the balance of 36, there are 22 in a category which plaintiff's counsel describe as "doubtful" (as to whether they are located in "inland waters" or in the "open sea"). Counsel then state that 14 are "clearly under the marginal sea."[52]

---

[52]Plaintiff's Brief, p. 167; Appendix B, pp. 227-258.

But counsel for plaintiff have been over-zealous in their efforts to minimize the effect of the examples of these grants from the States to the United States:

First, there are about 50 examples presented in the Appendix to the Answer of transactions involving submerged lands in the "open sea" or in counsel's "doubtful" category, rather than the 36 as counsel have computed.

Second, counsel for plaintiff classify 22 of the grants of submerged lands below low water mark in the coastal waters as being "doubtful," with 14 of these 22 being said to be doubtful by reason of their location in the Outer Harbors of Long Beach and Los Angeles.[53] While counsel for plaintiff further say that:

> "Out of an abundance of caution, these 14 examples of grants in the Long Beach and Los Angeles harbors may be classified as 'doubtful' "

and add that these are

> "probably under inland waters,"[54]

it is interesting to observe the *wholly inconsistent and contradictory positions* which the Attorney General has taken

---

[53]Counsel state that:

"14 [of these 22 so-called 'doubtful' grants] involve lands situated in the harbors of Long Beach and Los Angeles . . . and are well within the area described by the State as constituting San Pedro Bay. . . . This area has been held to be inland waters and not within the 3-mile belt. *United States v. Carrillo*, 13 F. Supp. 121 (S. D. Cal.)" Plaintiff's Brief, page 167, Note 26.

[54]Plaintiff's Brief, page 167.

with respect to the submerged lands in the Outer Harbors of Los Angeles and Long Beach.

In one place in their Brief, counsel seek to discount fully, as instances of acquiescence, two Acts of Congress which specifically recognize that title to the submerged lands in the Bay of San Pedro is in the municipal grantee of the State of California. Counsel say of those Acts that:

> ". . . these measures relate to land situated in either a bay or a harbor."[55]

No qualification whatever is made as to any "doubt" in that connection. The same inconsistent attitude is indicated when counsel seek to minimize opinions of prior Attorneys General that title to the submerged lands in the Bay of San Pedro is in the State or its municipal grantee.[56]

It is seen that when there is an advantage to the United States for its Attorney General to claim that the Outer Harbors of Los Angeles and Long Beach are in the "open sea," and hence may be claimed to belong to the United States, the Attorney General has not hesitated to reserve the right to make that assertion.

Third, counsel for plaintiff completely exclude from their computation of coastal water grants to the United

---

[55]Plaintiff's Brief, pages 188-189.

[56]Plaintiff's Brief, pages 189-190, Footnote 41a; page 192, Footnote 43.

States such items as the statutes enacted in substantially all the coastal states in the 1870's, at the express request of Congress and by the authorized representatives directed by Congress, thereby granting or authorizing grants to the United States of areas of submerged lands below low water mark in coastal waters around lighthouses and other aids to navigation.

Fourth, counsel for plaintiff have made strained classifications, as "inland waters" or "tide-lands" or "doubtful," of many of the examples of submerged land grants presented in defendant's Answer, although this attempted classification will not bear scrutiny in certain instances, as will be seen hereafter.

Fifth: The examples of grants of submerged lands under the "marginal sea," when seen against the background of Congressional policy above shown, indubitably prove an established practice on the part of the various departments and branches of the United States. They disprove the assertion of counsel for plaintiff that these transactions "did not represent and were not governed by any established practice".[57] To the contrary, they evidence a precise practice in conformity with a century-old policy of Congress.

---

[57]Plaintiff's Brief, page 180.

1. 1897 California Statute Granting Submerged Lands in Open Sea.

In 1890, Colonel George H. Mendell, Corps of Engineers, United States Army, being the officer in charge of the United States Engineer Office at San Francisco, California,[58] made two written reports to the Chief of Engineers, United States Army, War Department, recommending and requesting that

> "the State [of California] be asked to ***surrender to the United States its right and title to submerged lands*** adjacent to all tracts of land on tidal waters in the State held by the United States for defensive purposes extending from high water mark to a distance 300 yards below low water mark."[59]

Additional information was requested from Colonel Mendell concerning the desirability of obtaining these grants from the State of California of the "submerged lands" adjacent to military reservations in order that this information might *be furnished to the Judge Advocate General* of the Army. In a letter dated December 31, 1890, from Colonel Mendell to the Chief of Engineers, it is stated, in part, that:

> "I enclose a copy of a report . . . . dated December 20, which furnishes, as far as practicable, *the information desired by the Acting Judge Advocate General.*"

---

[58]See 1890 Annual Reports of the Chief of Engineers, United States Army. Part 4, page 2885, Appendix QQ, showing the office held by Colonel George H. Mendell during the year 1890.

[59]War Department File: Cal., Presidio of S. F. Jur. #1. Letters dated March 4, 1890, and December 31, 1890, from Colonel G. H. Mendell to the Chief of Engineers, set forth in Plaintiff's Brief, page 171, Footnotes 31 and 32.

The Chief of Engineers[60] presumably approved Colonel Mendell's recommendation, since the exact legislation recommended by Colonel Mendell was enacted several years later by the California Legislature by its Act of March 9, 1897.[61]

By this statute, the State of California

> "granted, released and ceded to the United States of America"

all the right and title of the State in the parcels of land

> "extending from high-water mark out to 300 yards below low-water mark, lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters"

held by the United States for military or defense purposes.

The United States, through its duly authorized officers in the War Department, prepared and filed with the Sur-

---

[60]Plaintiff's counsel state that the request was on the recommendation "of an Army Officer in the Engineer Office, San Francisco." (Br. p. 170.) The importance of the office of those sponsoring the request for California to enact legislation granting these submerged lands to the United States is thereby sought to be deprecated by counsel. Obviously, the recommendation of the officer in charge of the San Francisco Office was made to the Chief of Engineers, United States Army, War Department, who was, under Act of Congress, in full charge of all harbor improvement work for the United States. The recommendation of Colonel Mendell had to be approved by the Chief of Engineers before carrying it into effect by placing it before the California Legislature, as was obviously done in this case. Furthermore, the proposed legislation was submitted to the Judge Advocate General of the Army for approval before submitting it to the California Legislature.

[61]Cal. Stats. 1897, page 74.

veyor General of the State of California 17 different maps depicting various submerged areas granted by the State to the United States under said Act of March 9, 1897. Some of these lands lay in the Pacific Ocean, some lay in entrances to bays, and some in bays and harbors of the State.[62]

(a) PLAINTIFF CONCEDES AT LEAST 3 OF 17 GRANTS UNDER ACT OF MARCH 9, 1897, WERE SUBMERGED LANDS UNDER MARGINAL SEA.

Plaintiff concedes that:

". . . of the 17 tracts involved, only 3 *consisted of lands situated in the open sea* . . ."[63]

This concession does not go far enough, however, since there is at least one more of the 17 grants under the 1897 Act which is probably in the sea, the Lime Point Tract grant, hereinafter discussed.

In addition, there are two more of these 17 grants lying in what is now the Los Angeles Outer Harbor which are important as showing recognition of the State's titles in view of plaintiff's equivocal position as to whether San Pedro Bay, in which these Harbors are located, is "open sea" or an "inland water."

---

[62]Appendix to Answer, pages 93-117.

[63]Plaintiff's Brief, p. 172.

(b) ILLUSTRATED BY SAN DIEGO MILITARY RESERVATION SUBMERGED LAND GRANT.

Plaintiff's counsel concede, as to the grant of submerged lands adjoining the "San Diego Military Reservation," that

"Part of the area involved is along the open coast."[64]

Several hundred acres, consisting of a strip of submerged lands on the open coast of the Pacific Ocean approximately three miles long and 300 yards wide outside San Diego Harbor, were granted to the United States under said Act. A map of this grant, dated June 4, 1897, was prepared by the United States War Department and was filed with the California Surveyor General on that date.

It is seen from the map that it was compiled pursuant to the Act of Mar. 9, 1897 as well as an earlier Act.

The map depicts the Military Reservation lying northerly of the Entrance to the Bay of San Diego extending from Point Loma, the northerly headland of the Entrance to San Diego Bay. A strip of submerged lands 300 yards wide extending oceanward from the line of high water mark bears the following legend on said map:

"Line 300 yards out beyond low-water mark."

This 300 yard strip of submerged lands, in addition to running along the open coast of the Pacific Ocean to Point Loma southerly a distance of approximately three miles, then extends easterly, without any break, around

---

[64]Plaintiff's Brief, App. B, p. 227; p. 172.

the tip of Point Loma into the Entrance of and the Bay of San Diego, a distance from Point Loma into the Bay of San Diego of approximately three miles. Said strip consists of an area *in excess of 330 acres* of submerged lands on the open coast of California outside of any harbor or bay. It also covers an additional 300 acres within the Bay.[65]

A copy of this map is set forth in the Brief, page 159.

(c) Illustrated By Zuninga Shoal Tract Submerged Land Grant

A second grant under the 1897 Act which counsel for plaintiff concede involved submerged lands below low water mark in the marginal or "open sea," is the Zuninga Shoal Tract grant.[66]

On June 4, 1897, the United States War Department prepared and filed a map with the California Surveyor General entitled "Map of the Zuninga Shoal Tract, San Diego Harbor, California." The map, a photostatic copy of which is set out in the Appendix to the Answer,[67] bears the legend that it was prepared pursuant to the Act of Mar. 9, 1897 as well as an earlier Act.

---

[65]Appendix to Answer, pages 91-94.

[66]Plaintiff's Brief, pages 170. n. 29; 172; Appendix B, page 227. The Appendix B page 227 "Remark" of counsel for plaintiff in reference to this Zuninga grant is misleading, since it says "*entrance* to San Diego Bay," but then classifies it as "open sea." This tract is not *in* or *at* the "entrance" to the Bay, but lies in the open sea, on the southerly open sea side of the south headland to the Bay of San Diego.

[67]Appendix to Answer, p. 96.

This map depicts a strip of land 300 yards wide, extending seaward from low water mark. This strip lies on the open coast of the Pacific Ocean outside and seaward of the entrance to San Diego Harbor. It runs along the coast a distance of approximately 1,000 yards. It covers an area of *approximately 60 acres* of submerged lands lying below low water mark on the open coast of California outside of any bay or harbor.[68]

(d) Illustrated By Lime Point Submerged Land Grant.

A third grant to the United States under the 1897 Act which counsel for plaintiff concede[69] involved submerged lands below low water mark in the open sea is the "Lime Point Tract" grant.

On June 4, 1897, the United States War Department prepared and filed with the California Surveyor General a map entitled "Map of the Lime Point Tract, Harbor of San Francisco." This map depicts a strip of submerged lands 300 yards wide extending from a point on the shore of the Pacific Ocean approximately three-quarters of a mile northerly of Point Bonita, thereon shown as the northern exterior headland of the Straits of the Golden Gate at the entrance to San Francisco Bay. This strip then runs southerly a distance of approximately three-quarters of a mile along the open coast of the Pacific Ocean to Point Bonita. The strip then turns into the Straits of the Golden Gate and continues northeasterly and around said point into the Golden Gate, and thence continues into the Bay of San Francisco. The map of

---

[68]Appendix to Answer, pages 95-96.

[69]Plaintiff's Brief, pages 170, n. 29; 172; Appendix B, page 227.

Lime Point tract bears the legend of "Pacific Ocean" for the strip lying oceanward of the headland at Point Bonita; bears the legend "Golden Gate" as the strip continues past Point Bonita and into the Straits; and then bears the legend "Bay of San Francisco" as it passes beyond the Straits of the Golden Gate and into the Bay. This grant involves *over 100 acres* of submerged lands lying below low water mark in the open sea and outside of the Straits of the Golden Gate of the Bay of San Francisco.[70] A photostatic copy of the Lime Point tract map is contained in the Appendix to the Answer.[71]

(e) Illustrated by Presidio Military Reservation Submerged Land Grant.

There is a fourth grant to the United States under the 1897 Act—the Presidio Military Reservation grant—a portion of which, we submit, involved submerged lands lying below low water mark and probably in the open sea and outside of any bay or harbor.

Counsel for plaintiff merely classify this grant as "inland waters" or "tidelands" and under their "Remarks" state that it is

> "situated on south side of Golden Gate, San Francisco Bay. It is not along the open coast."[72]

Counsel for plaintiff are in error as to this grant. The "Map of the Military Reservation of the Presidio," pre-

---

[70]It is rather amusing to observe the "remarks" of counsel for plaintiff in Appendix B to their Brief (p. 227) opposite the Lime Point grant that "a small portion seems to be located along the open sea." Counsel consider over 100 acres of submerged lands to be a "small portion," although these 100 acres lying in the open sea constitute approximately 20% of the total strip included in this particular grant.

[71]Appendix to Answer, pages 99-100.

[72]Plaintiff's Brief, Appendix B to the Brief, page 227.

pared by the United States War Department, and filed with the California Surveyor General on June 4, 1897, a photostatic copy of which is set out in the Appendix to the Answer,[73] shows a strip of submerged lands 300 feet wide, extending below low water mark, with the westerly one-half of this strip being depicted thereon as lying in the "Pacific Ocean"; and with the easterly one-half of this strip of submerged lands depicted thereon as extending into the "Bay of San Francisco." It is obvious that the United States Engineer Office in charge of the San Francisco area definitely classified this strip as lying in the open sea with the other half lying in the Bay of San Francisco. We may presume that the United States District Engineer Office in charge of the area was more familiar with this area than is the Department of Justice with their offices in Washington, D. C. If this map is taken at its face value, the grant should be classified as lying partly in the marginal sea. There are *over 100 acres* of such submerged lands in this grant depicted by this map as lying in the "Pacific Ocean"; and hence, in the marginal sea.

It may be that there is some room for argument as to which are the exterior headlands of the Golden Gate in the Pacific Ocean. Since the entrance widens gradually, the headland at the point of the Presidio, selected by the War Department in preparing this map, is a reasonable selection. At the very least, counsel for plaintiff should have been fair enough to place this grant in their "doubtful" category as to whether it involved "inland waters" or "open sea."

---

[73]Appendix to Answer, p. 98.

(f) Illustrated by Deadman's Island Submerged Land Grant.

A fifth grant under the 1897 Act—the Deadman's Island grant—is important, we submit. In 1897, Deadman's Island was a rock of about 6 acres jutting out of the deep water of the Pacific Ocean and the Bay of San Pedro, lying approximately one mile northwesterly from the entrance to the Inner Harbor of Los Angeles. This island was completely surrounded with deep water of the Pacific Ocean and Bay of San Pedro.[74]

On January 24, 1906, the United States War Department prepared a map entitled

> "Deadman Island Military Reservation, San Pedro, California"

and filed it with the Surveyor General of California. A photostatic copy of the map is set out in the Appendix to the Answer, page 102. This map bears the legend that it is compiled from official records to meet the requirements of the Act of March 9, 1897, as well as the Act of March 2, 1897. It depicts a small island approximately 200 yards in length and less than 150 yards in width, enclosed by a rough circle extending 300 yards seaward of its line of low water mark.[75]

---

[74]See photographs of Deadman's Island in its natural state—Appendix to Answer, page 103.

[75]Appendix to Answer, page 102.

Counsel for plaintiff list the Deadman's Island grant in its "doubtful" column, and say that

> "It is not clear whether San Pedro Bay is to be regarded as a true bay, or as open sea. However, the area has been held to be inland waters in United States v. Carrillo, 13 Fed. Supp. 121 (S. D. Cal.)."[76]

However, as pointed out elsewhere,[77] the United States Attorney General has also taken the position that reclaimed submerged lands and existing submerged lands on and oceanward of Terminal Island, which is the ocean shore of the Pacific Ocean and the Bay of San Pedro, are subject to the claim of ownership by the United States. In view of this fact and of the physical difficulty of determining whether the Bay of San Pedro constitutes one of plaintiff's so-called "inland waters," and since counsel for plaintiff will not take a position one way or the other with reference to the Bay of San Pedro, we submit the Court should give full consideration to this Deadman's Island grant. This is particularly important in view of the Acts of Congress, the prior opinions of the Attorney General himself, and the reports of the War Department with respect to the State's ownership of the submerged lands lying in the Bay of San Pedro, as hereinafter mentioned.

---

[76]Plaintiff's Brief, Appendix B, page 228.

[77]See *infra*, pp. 228-229.

(g) Illustrated by Ft. McArthur Military Reservation Submerged Land Grant.

Another submerged land grant to the United States under the 1897 Act is the Ft. McArthur Military Reservation grant. The submerged lands involved in this grant lie within the Pacific Ocean and the Bay of San Pedro.

On June 4, 1897, the United States War Department prepared a map and filed it with the California Surveyor General entitled

> "Map of the Military Reservation at San Pedro, California."

Its legend stated that it was compiled from official records to meet the requirements of the Acts of the California Legislature, approved March 2 and March 9, 1897. It depicts a strip of submerged lands 300 yards wide lying in the Pacific Ocean and the Bay of San Pedro, in front of the military reservation (now known as Ft. McArthur). A photostatic copy of the map is set forth in the Appendix to Answer.[79]

Counsel for plaintiff make the same comment with respect to the Ft. McArthur Military Reservation grant as they do to the Deadman's Island grant, namely, that

> "It is not clear whether San Pedro Bay is to be regarded as a true bay or as open sea."[80]

However, this is again an important grant of submerged lands lying in the Pacific Ocean and the Bay of San Pedro,

---

[79] Appendix to Answer, pages 105-106.

[80] Plaintiff's Brief, Appendix B, page 228.

and in view of the failure of plaintiff's counsel to take a position as to whether this involves open sea or "inland waters," we call the Court's particular attention to the treatment made of portions of this submerged land grant by the Secretary of War, and by certain Acts of Congress presently discussed.

(h) The Remaining Eleven Submerged Land Grants Under 1897 Act.

The details of the other 11 grants of submerged lands to the United States under the 1897 Act, as evidenced by maps prepared by the United States, through its duly authorized officers, and filed with the Surveyor General of California, are set forth, with some of their respective maps, in the Appendix to Answer.[82] The significance of these remaining 11 grants under the 1897 Act is that, while they each involve submerged lands lying within San Francisco Bay, or Monterey Bay, or San Diego Bay, they illustrate the proposition we have heretofore made in this Brief, namely that there is no difference in the basic title to submerged lands under navigable waters on the open coast and those in bays and harbors. The recognition by the various branches and departments of the United States of all these 17 grants under the 1897 Act plainly demonstrate that, until counsel formulated this new-found theory, no one has ever made any distinction in the basic title to submerged lands under navigable waters between those on the open coast and those in bays, harbors and rivers.

---

[82] Appendix to Answer, pages 95-117.

(i) Congress Itself Specifically Recognized the Grants to the United States Under the 1897 Act.

In 1912, in connection with the building of the Los Angeles Harbor in the Pacific Ocean and Bay of San Pedro, an exchange was worked out between the United States and the City of Los Angeles. The State of California, in 1911, had granted to the City of Los Angeles all tide and submerged lands lying within its municipal boundaries, which boundaries extend into the Pacific Ocean coincident with the State boundary, and thus included all that portion of the Pacific Ocean and Bay of San Pedro lying within the City of Los Angeles boundary. This exchange involved a 9.75-acre parcel of submerged lands adjoining the Deadman's Island Military Reservation which had been granted to the United States under the 1897 Act, as above mentioned. By an Act of Congress, approved July 25, 1912, Congress authorized the exchange with the City of Los Angeles of said 9.75-acre parcel and provided in said Act, in part, as follows:

> "That the Secretary of War be and he is hereby authorized to grant to the City of Los Angeles, California, all of the right, title and interest of the United States in and to that portion of the submerged lands around the military reservation on Deadman's Island *acquired under act of the Legislature of the State of California approved March 9, 1897* . . . containing an area of 9.75 acres, more or less, in exchange for the *grant by said City* to the United States . . . of an approximately equal *area of submerged lands of said city*. . . ."[84]

[84]Details of this exchange are set forth in Appendix to Answer, pages 261-269; pages 101-108.

Another Act of Congress of March 3, 1925, required the City of Los Angeles to convey to the United States a 61.98-acre parcel of submerged lands adjoining Deadman's Island Military Reservation, in connection with a further widening of the channel adjoining said Island. The details of this Act of Congress and the exchange effected pursuant thereto, and the recognition by Congress of the title of the submerged lands being in the State and its municipal grantee, are set forth in Appendix to Answer.[85]

(j) The United States Attorney General Has Rendered Opinions Declaring Validity of Grants to United States Under 1897 Act.

The United States Attorney General and the United States Attorneys for the Southern District of California have rendered their opinions in connection with conveyances and exchanges of portions of such submerged lands granted to the United States by said 1897 Act.

The exchange in 1925-1927 between the United States and the City of Los Angeles of 61.98 acres of submerged lands acquired by the United States under the 1897 Act surrounding Deadman's Island[86] was passed upon by the then United States Attorney General, William D. Mitchell. In his written opinion to the Secretary of War on June 30, 1927, as to an equivalent parcel of submerged lands below low water mark in the Pacific Ocean and Bay of

---

[85]Appendix to Answer, pages 269-283; pages 101-108.

[86]The details of this 61.98 acre exchange are set forth in Appendix to Answer, pages 269-283; pages 101-108.

San Pedro adjoining said Deadman's Island, Attorney General Mitchell stated, in part, that:

> "From an examination of the abstract, I find the title to said land in the City of Los Angeles."[87]

Opinions of the United States Attorney General and of the United States Attorney at Los Angeles in connection with the 9.75-acre parcel exchange of submerged lands surrounding Deadman's Island, effected in 1912-1915, as hereinabove discussed, found title to these submerged lands to be in the City of Los Angeles. An opinion dated October 16, 1915, in connection with this exchange stated, in part, that:

> "I have to advise *that the Attorney General has passed the title of the City of Los Angeles to the 9.75 acres* of land in the outer harbor at Los Angeles, California, which the City of Los Angeles has been heretofore authorized to transfer to the United States Government in exchange for a like amount of land lying on the westerly side of the entrance channel to the inner harbor of Los Angeles, *and has found the title good.*
>
> "Pursuant to his instructions, a deed from the City of Los Angeles to the United States has been placed of record, and I understand that the actual exchange of the property took place some time ago."[88]

It should be observed that, prior to the Attorney General sending said title opinion, the United States Attorney at

[87] Appendix to Answer, page 282.
[88] Appendix to Answer, page 266.

Los Angeles on May 11, 1915, in connection with this 9.75-acre parcel exchange, advised the City of Los Angeles that in order for title to the exchanged lands to be shown in the City of Los Angeles to the satisfaction of the United States Attorney General, it would be necessary to furnish a

> "certificate of the City Abstractor *tracing the title from the State through the City . . . and a showing as to how the State came into possession of the land.*"

In response to this request, the City Attorney of the City of Los Angeles advised the United States Attorney that

> "upon the admission of California to the Union in 1850, the title to *these lands vested in the State by virtue of its sovereignty* until granted to the City of Los Angeles in 1911."[89]

(k) SECRETARY OF WAR AND VARIOUS OFFICERS IN WAR DEPARTMENT HAVE UNIFORMLY ASSERTED VALIDITY OF GRANTS TO UNITED STATES UNDER 1897 ACT.

On numerous occasions the various officers in the War Department have made official rulings asserting the validity of the grants to the United States under the 1897 Act. The Secretary of War himself has made similar assertions. For example, on October 2, 1933, George H. Dern, then Secretary of War, executed a certificate and caused such certificate to be filed in the office of the County Recorder of Los Angeles County, California, at-

[89] Appendix to Answer, pages 265, 280.

tached to a map of the Ft. McArthur Military Reservation at San Pedro, California, which map accompanying said certificate bears a legend reading, in part:

> "Note: *This area ceded to United States by State of California by Act of Mar. 9, 1897*, (Cal. Stats. 1897, p. 74)."[90]

(l) Comments of Counsel for Plaintiff on 1897 California Statute Granting Submerged Lands in Open Sea.

The contention of counsel for plaintiff is that this Act of 1897

> "in substance merely authorized a quitclaim of such interest as the State might have in the lands."[91]

This contention is erroneous.

The conveying clause of the Act uses the word "grant." By the use of the word "grant" in California certain covenants and warranties are impliedly undertaken,[92] which is not the case where the word "quitclaim" is used. Whether or not an instrument constitutes a "quitclaim" depends upon the intention of the parties to it as gathered from the language of the instrument itself and the attending circumstances, and is not to be determined by the mere omission of a covenant of warranty.[93]

---

[90]Appendix to Answer, pages 107-108.
[91]Plaintiff's Brief, page 172.
[92]Civil Code, Sec. 1113.
[93]4 *Tiffany, "Real Property"* (3rd Edition 1939), Section 959; 3 A. L. R. 945; 26 Corpus Juris Secundum, page 182.

This Act was not a mere "quitclaim." This is conclusively shown from that portion of the statute, reading as follows:

> ". . . provided, that the title to each parcel of land hereby granted, released, and ceded to the United States, shall be and remain in the United States *only so long* as the United States shall continue to hold and own the adjacent lands now belonging to the United States; . . . ."

If the State were making a mere "quitclaim" of its interest in these submerged lands, it would never have added the proviso for a reverter of the State's title in the event the United States disposed of the adjacent upland.

Counsel for plaintiff make a big point of the fact that there was another California statute (March 2, 1897) which required the United States to file a map with the County Recorder as a condition to the cession of political jurisdiction by the State to the United States concerning Federal reservations. Counsel then erroneously contend that the 17 maps filed by the War Department under the March 9, 1897 Act, granting title to the 300-yard strip of submerged lands around reservations, were actually filed under the "cession of jurisdiction" Act and not under the "granting" Act of March 9, 1897, counsel saying that:

> ". . . these maps were not filed pursuant to the Act of March 9, 1897, notwithstanding the misleading notations on some of the maps; they were filed

> under a wholly different statute, the Act of March 2, 1897 (Stats. 1897, page 51), which was an Act ceding exclusive *jurisdiction* over all lands held for military purposes and not an Act granting title."[94]

Counsel err by their failure to read these two statutes carefully.

It is true that, at the request of the United States,[95] the State of California enacted a statute on March 2, 1897,[96] ceding political jurisdiction to the United States over all areas then held by or thereafter ceded to the United States. Said Act of March 2, 1897, required

> "that a sufficient description be metes and bounds and a map or plat of said lands be filed *in the proper office of record in the county in which the same are situated;* . . . ."

But counsel fail to note that this Act required such filing to be made with *the County Recorder* where the real property was situated; and that the maps involved herein were filed *with the State Surveyor General* in Sacramento County.

---

[94]Plaintiff's Brief, page 191. Also pages 170-171, note 30.

[95]*Cf.* 70 O. A. G. 629, which states that:

> "The resolution [of Congress] of July 11, 1841 (5 Stat. at Large, p. 408). . . . enacts that it shall be the duty of the head of department under whose direction any lands for the purpose aforesaid [lighthouses] may be purchased, to apply to the legislature of the state in which it lies 'for a cession of jurisdiction,' and in case of refusal to report the same to Congress."

[96]Cal. Stats. 1897, page 51.

Counsel concede that some of the maps filed by the office of the War Department with the Surveyor General of the State of California did

> "contain notations indicating that they were filed pursuant to the Act of March 9, 1897,"

but counsel assert that there may have been some understandable confusion in this regard.[97] However that may be, the fact remains that the officers in charge of the United States Engineer Offices in San Francisco and Los Angeles did file 17 maps *with the Surveyor General* of the State of California (*not with the County Recorder*, as required by the Act of March 2, 1897). This is seen from the photostatic copies of the maps themselves and the quotations from the maps (Appendix to Answer, pp. 93-117). Sixteen of these 17 maps (not merely "some" of them as counsel say—Br. p. 170, n. 30), filed by the War Department officers with the State Surveyor General make specific reference to the Act of March 9, 1897 (Appendix to Answer, pp. 93-117).

Furthermore, counsel for plaintiff are in error in inferring that the 17 maps *filed with the California Surveyor General* were required to be filed by the Act of March 2, 1897. The fact is that neither of these two Acts required any maps to be filed by the United States *with the State Surveyor General;* but only that the Act of March 2, 1897 required maps be filed with the *County Recorder*. The War Department officers simply desired

---

[97]Plaintiff's Brief, page 171.

to make a record of the title granted by the State to the United States under the Act of March 9, 1897, when they filed these 17 maps *with the Surveyor General.*

2. North Island Grant of Submerged Lands in Marginal Sea.

The North Island 1934 grant from California to the United States involved several parcels, one consisting of a strip of submerged lands *in the marginal sea* extending from high water mark out to such pierhead line as the United States may establish. As pierhead lines are uniformly established in deep water capable of navigation, they are always substantially below the line of the low water mark. This parcel lies on the open coast of the Pacific Ocean outside of any bay or harbor. It was requested by high officers of the United States Navy and the title was passed upon by the United States Attorney General's Office.

North Island is a peninsula, the northerly tip of which forms the outer extreme southerly headland at the entrance to the Bay of San Diego, California. In 1930, the Commandant of the 11th Naval District, United States Navy Department, prepared and forwarded to the Chief of Naval Operations a report on the necessity of the United States acquiring title from the State of California to parcels of tide and submerged lands along the shore of the Pacific Ocean adjacent to North Island as well as parcels lying adjacent to North Island on the bay side thereof in the Bay of San Diego. This report contained a detailed statement of the history of the titles both to North Island and to the tide and submerged lands surrounding North

Island in the Pacific Ocean, in the entrance to the Bay, and in the Bay of San Diego. With respect to the parcel lying on the ocean front, said report stated that:

> "There are still other tidelands adjacent to North Island to which the Government should secure title. These are the tidelands along the Ocean front. At the present time, *title to these lands lies with the State and technically therefore the Government does not have control of the beach.* The description of these lands is as follows:
>
> [Setting forth the description of tidelands and *submerged lands* extending out to the pierhead line in the Pacific Ocean as such pierhead line may thereafter be established by the Federal Government, which description is identical with that contained in the 1931 statute and the 1934 grant from the State, hereinafter mentioned.]"

A map accompanied this report, a photostatic copy of which is set out in the Appendix to the Answer, page 123.

The requests contained in the report of said Commandant were presented by the United States to the California Legislature urging that title in accordance with such recommendations be conveyed to the United States as to the areas of tide and submerged lands mentioned in said report.

Pursuant thereto, the California Legislature enacted a statute approved May 11, 1931,[98] authorizing its Department of Finance

---

[98]Cal. Stats. 1931, page 707.

"to convey to the United States . . . all *tidelands and submerged lands* (whether filled or unfilled), *held by the State by virtue of its sovereignty*, situated in the Bay of San Diego, in the Spanish Bight in the Bay of San Diego, *and in the Pacific Ocean*, ... more particularly described as follows:

". . . (c) *All tidelands and submerged lands, situated in the Pacific Ocean*, adjacent to North Island and the Strand connecting North Island with South Island Coronado, ... *lying between the said line of the peninsula of San Diego and the pierhead line in the said Pacific Ocean as the same may hereafter be established by the Federal Government*, . . ."

A series of letters were thereafter exchanged between the United States Navy Department and the Department of Finance of the State of California concerning a condition proposed by the Department of Finance to be included in such deed whereby title to said tide and submerged lands would revert to the State in the event North Island was no longer used by the United States for the purposes to which it was then devoted.

Finally, on March 9, 1934, said Commandant wrote the Department of Finance advising that he had then received a letter from the Secretary of the Navy stating the view of the Judge Advocate General of the Navy that acceptance by the United States of the tide and submerged lands as authorized by the California Legislature may legally be effected without further legislation from Congress; and requested that a deed be executed by the State containing

the proposed condition for reverter of title to the State; and stated that such deed should provide for acceptance by the Secretary of the Navy on behalf of the United States.

Thereafter and on May 21, 1934, the Division of Lands of the State of California transmitted a deed to said Commandant granting to the United States title to said tide and submerged lands, said deed reciting, among other things, that the Department of Finance was authorized to convey to the United States under said statute

> "title in and to all tide and *submerged lands* (whether filled or unfilled) held *by said State by virtue of its sovereignty,* situate in the Bay of San Diego in the Spanish Bight, in the Bay of San Diego, and *in the Pacific Ocean,* . . . which said lands are hereinafter more particularly described: [With a description identical with that contained in the statute hereinabove set forth.]"

Said deed contained two reservations, the second of which provided for a reverter to the State of the title to said tide and submerged lands therein described, said second condition reading, in part, as follows:

> "2. In the event North Island . . . is no longer used by the United States of America for the purposes to which it is now devoted, *the title to the hereinbefore described lands shall immediately revert to the State of California.*"

On June 25, 1935, said Commandant wrote said Department of Finance advising that the deed dated May

21, 1934, had theretofore been referred to the United States Attorney at Los Angeles for investigation as to the sufficiency of the title, and then informed the Department of Finance

"of the Navy Department's acceptance of the deed"

and that it had been recorded by the United States in the San Diego County Recorder's Office on June 12, 1935, in Book 409, page 225, of the Official Records of said County, and that

> "the Department of Finance is hereby informed of the Navy Department's acceptance of the deed."[99]

(a) *Grant to Future Pierhead Line Necessarily Conveyed Submerged Lands in "Open Sea"*: Counsel for plaintiff erroneously state, as to this North Island grant, that:

> "The transfers of title growing out of this report did not in fact include any lands under the marginal sea. Notwithstanding the language 'lying between the said line of the peninsula of San Diego and the pierhead line in the said Pacific Ocean as the same may hereafter be established by the Federal Government,' no lands seaward of low water mark on the ocean side of the Island were acquired. [See map. App. 122.] According to the records of the War Department, the pierhead line was not then and never has been extended into the Pacific Ocean at this location.[99a]

---

[99]The details of this entire transaction resulting in the deed of May 31, 1934, are set forth in Appendix to Answer, pages 117-131.

[99a]Plaintiff's Brief, page 193.

Counsel for plaintiff make the further erroneous observation that:

> "The grant purported to cover tide and submerged lands in three separate areas: (1) In San Diego Bay; (2) in Spanish Bight, an arm of San Diego Bay; and (3) in the Pacific Ocean (adjacent to North Island referred to in the grant as the 'Peninsula of San Diego') lying between highwater mark and 'the pierhead line in the said Pacific Ocean as the same hereafter be established by the Federal Government' [p. 131]. No pierhead line has even been established at this point in the Pacific Ocean; consequently no lands under the open sea were in fact granted. (See *supra*, p. 193.) Thus, the only areas actually granted were not along the open coast,"

and counsel then classify this grant as being "inland waters or tidelands."[100]

Counsel err in stating that no title to lands below low water mark on the open coast were transferred by this grant. The description in the deed originated with the report of the Commandant of the 11th Naval District to the Chief of Naval Operations of the Navy Department in the report of September 24, 1930, as above mentioned. The requested description was then carried verbatim into the 1931 statute of the California Legislature and specifically described "submerged lands, situated in the Pacific Ocean," as well as "tidelands." The only purpose of in-

---

[100]Plaintiff's Brief, Appendix B, page 229.

cluding in this grant the "submerged lands" out to the pierhead line thereafter to be fixed by the United States was so that the United States would be in complete ownership and control of the tide and submerged lands fronting on the Ocean adjacent to its naval base. A pierhead line is uniformly established in deep water, well below the line of mean low water mark. At any time it is found necessary to fix the pierhead line, the War Department will do so. Automatically that will fix definitely the boundary of this grant in the submerged waters of the Pacific Ocean. The War Department may thereafter change such pierhead line by placing it further into the Pacific Ocean or nearer to the shore. The submerged lands were granted, undoubtedly, and the only matter left for further determination is the exact location in the Pacific Ocean of the pierhead line. That fact does not, we submit, in any way detract from this grant as including submerged lands below low water mark in the "open sea."

(b) *Title Opinion Was Rendered by Attorney General's Office:* Counsel for plaintiff imply that there is some doubt that their Office rendered a title opinion for this grant of submerged land adjacent to North Island by saying that

> ". . . it is not clear from the State's allegations that an opinion was actually rendered in this instance."[101]

This inference is unworthy of any serious consideration. As shown above, the letter dated June 25, 1935, from the

---

[101] Plaintiff's Brief: pages 189-190, Note 41a.

Commandant of the Eleventh Naval District to the State Department of Finance, advised that the deed had theretofore been referred to the United States Attorney at Los Angeles for investigation as to the sufficiency of the title; and then advised that the Navy Department had accepted the deed and that it had been recorded by the United States. It is apparent, therefore, that the Attorney General's Office obtained the title data, reviewed it, and then rendered the required opinion in this instance. As counsel for plaintiff have the records in their own files, they can readily clear up this matter if there is any remaining doubt.

3. Coronado Beach Military Reservation Submerged Land Grant:

In 1941 the United States War Department wrote to the California State Lands Commission and requested that legislation be enacted authorizing an exchange of lands, whereby the State would grant to the United States a 32.8-acre parcel of submerged lands lying in the marginal sea adjoining Silver Strand and the Coronado Beach Military Reservation outside of any bay or harbor. There was transmitted with said request a map prepared by the War Department showing the location of the parcels of land subject to this exchange, a copy of this map being set out in the Appendix to the Answer.[102] Reference was made in this request to the grant from the State to the United States under the Act of March 9, 1897, granting a 300-yard strip of submerged lands adjoining the Coronado Beach Military Reservation.[103]

---

[102]Appendix to Answer, page 139.

[103]See Appendix to Answer, pages 112-114; 134-138.

It was stated in this request that the War Department proposed to construct an improvement on the ocean side of the Silver Strand south of the City of Coronado opposite the Military Reservation; and that a tentative agreement had been effected between the representatives of the United States and the State, whereby the United States would convey to the State all property contained within the Military Reservation in exchange for an equivalent area of State land on the ocean side of Silver Strand. It was there stated that title to the tide and submerged lands adjacent to the Military Reservation granted the United States under the 1897 Act

> "reverts to the State whenever the United States' land is sold."

Pursuant to said request, the Legislature of California enacted a statute approved July 19, 1941,[104] authorizing the State Lands Commission

> "to transfer by deed to the United States of America all or a portion of those tidelands and *submerged lands of the State of California* lying southwesterly of that certain military reservation, known as 'Coronado Beach,' . . . upon such terms and conditions as may appear to the State Lands Commission to be in the public interest."

The State Lands Commission executed an instrument conveying certain rights in said 32.8-acre parcel to the United States, and on August 5, 1941 delivered the instrument to the War Department representative. Thereafter, the War Department representative wrote the State Lands

---

[104]Cal. Stats. 1941, page 3090. Appendix to Answer, page 139.

Commission, acknowledging receipt of said instrument and advised that

> "Owing to the time element, higher authority has decided to forego for the present making this exchange. It has been decided to construct this project on the Military Reservation located on the Bay Side of Silver Strand."[105]

Counsel for plaintiff pass off this transaction by saying that

"This was not a completed transaction,"

and then counsel leave this grant entirely unclassified.[106] This comment and treatment are unsatisfactory since counsel ignore the action taken by the State at the request of the War Department, including passage of a statute and execution of an instrument conveying the requested rights under the marginal sea.

4. Catalina Island Pebbly Beach Easement.

In 1941, Columbia Construction Company was under contract with the United States War Department to construct an extension to and restore a portion of the existing breakwater in the Pacific Ocean and Bay of San Pedro enclosing portions of the Long Beach and Los Angeles Outer Harbors. The contractor was obligated to obtain and remove certain materials from Santa Catalina Island, situated in the County of Los Angeles, State of California, lying approximately 20 miles in the Pacific Ocean off the mainland. The contractor was instructed by the War Department to request permission from the

---

[105]Appendix to Answer, pages 140-141.

[106]Plaintiff's Brief, Appendix B, pages 229-230. Also pp. 193-194.

California State Lands Commission to erect and operate a pile dock into the waters of the Pacific Ocean off Santa Catalina Island. Pursuant to written request, the State Lands Commission granted said contractor, acting under such instructions from the War Department, a written "Easement To Construct And Maintain Pier—No. 42." Said easement was granted pursuant to Section 675 of the California Political Code for a period of 12 years from November 6, 1941. The rental therefor was the sum of $144 upon execution of the agreement and $144 annually thereafter. Said rental was presumably paid by the United States through the contractor.

Said easement granted the right to construct and maintain a pier

> "upon and over those certain tidelands and *submerged lands* in the County of Los Angeles, State of California, more particularly described as follows, to wit:
>
> "All that portion of a strip of land 200 feet in width *containing one acre,* more or less, lying seaward of the ordinary high water mark of the Pacific Ocean on the Island of Santa Catalina. [Then describing a center line measured 217.8 feet into the Pacific Ocean from the line of ordinary high water mark.]"

A substantial portion of said one-acre tract is situated below low water mark in the marginal sea.

In response to a notice from the War Department, the State Lands Commission wrote the War Department on February 13, 1942, and advised that the contractor had obtained permission from the State Lands Commission

for the construction and maintenance of the pier in the Pacific Ocean at this location.[107]

Counsel for plaintiff classify this transaction as being in the "open sea."[108]

Counsel for plaintiff comment on the Catalina Island Pebbly Beach Easement as follows:

> "Action taken by the United States consisted of instructions by U. S. Engineers to the Construction Company and a notice from the War Department to the State of the Company's application for permission to construct the docks."

and counsel argue that the easement was granted "to a private construction company having a contract with the War Department" and suggest that it was

> "probably taken out of an abundance of caution, in the interest of expediting the defense program, rather than as a result of a studied conclusion that the areas were owned by the State."[109]

The fact remains that there was a grant of a one-acre area, mainly of submerged lands below low water mark, conceded to be in the "open sea," made by the State at the special request of the War Department officers in charge of the breakwater project, with the rental paid to the State out of Government funds. This evidences the uniform treatment of the subject of ownership of submerged lands in the marginal sea by the United States War Department.

---

[107]Appendix to Answer, pages 146-152.

[108]Plaintiff's Brief, Appendix B, pages 230-231; pages 178-179.

[109]Plaintiff's Brief, page 179; Appendix B, page 231.

3. Catalina Island Rock Loading Plant Easement.

Another easement was requested by Columbia Construction Company, pursuant to instructions from the United States War Department. The California State Lands Commission on November 7, 1941, granted said contractor an

> "Easement to Construct and Maintain Rock Loading Plant No. 3"

for a period of twelve years, for a consideration of $288 upon execution of said easement, and a like sum annually. Said easement was for a rock loading plant

> "Upon and over those certain tidelands *and submerged lands* in the County of Los Angeles, State of California, more particularly described as follows, to wit:
>
> "All that portion of a strip of land 435.6 feet in width *containing two acres*, more or less, lying seaward of the ordinary high water mark of the Pacific Ocean on the Island of Santa Catalina. [Describing a center line extending 200 feet into the Pacific Ocean from the line of ordinary high water mark thereof.]"

Substantial portions of these two acres are situated below the line of low water mark outside of any bay or harbor and in the marginal sea, approximately 2⅓ miles southeast of Avalon, Santa Catalina Island. The State Lands Commission gave notice to the War Department that it had granted to said contractor this easement to construct the rock loading plant in the Pacific Ocean.[110]

---

[110] Appendix to Answer, page 153.

Counsel for plaintiff fail to list this rock loading plant easement as a separate transaction in the "open sea."[111] Counsel apparently count this easement and the Pebbly Beach easement as a single transaction, thereby cutting down the number of conceded grants in the "open sea." This, of course, is erroneous, since it was an entirely separate grant.

6. Saltwater Pipe Line Easement in Pacific Ocean and Bay of Santa Monica.

In 1943, a written application was made to the California State Lands Commission by the agent for Defense Plant Corporation, a corporation wholly owned by the United States of America, for an easement to construct and operate a saltwater return pipe line into the Pacific Ocean and Bay of Santa Monica at El Segundo, Los Angeles County, California. This was a part of a butadiene synthetic rubber plant being constructed and operated for Defense Plant Corporation and the United States by said agent, Standard Oil Company of California. In said application it was stated that:

> "As it is contemplated that the proposed easement will be transferred to Defense Plant Corporation, we respectfully request that a provision permitting Standard Oil Company of California to do so be incorporated therein."

On April 29, 1943, the State Lands Commission granted said application on the condition that the easement to be

---

[111] Plaintiff's Brief, Appendix B, pages 230-231; page 179.

issued thereunder to Standard Oil Company terminate in the event Defense Plant Corporation is no longer owned by the United States and in no event to exceed a 15-year term. Pursuant thereto, on April 29, 1943, the State Lands Commission executed a document entitled, "Right of Way Easement for Saltwater Return Pipe Line —No. 89," which was executed by Standard Oil Company, granting the right of way

> "Over and on those tide and *submerged lands* located within the County of Los Angeles, more particularly described as follows:
>
> "A right of way 100 feet in width extending from the ordinary high water mark of the Pacific Ocean to a line 220 feet offshore and parallel with the ordinary high water mark. [Describing a line beginning at a point in the ordinary high water mark of the Pacific Ocean and extending 220 feet westerly into the Pacific Ocean.]"

The agent for Defense Plant Corporation went into possession of said easement and constructed the pipe line extending into the Pacific Ocean and Bay of Santa Monica a substantial distance below low water mark. The agent of Defense Corporation has paid the rentals required under said easement to the State Lands Commission and presumably Defense Plant Corporation and the United States have reimbursed and paid the agent for all rental and expenses in connection with said easement No. 89.[112]

---

[112]Appendix to Answer, pages 154-156.

The standard form of contract between Defense Plant Corporation and its agent for constructing and operating a plant such as said butadiene plant, contains the uniform provision that title, property, rights and interests acquired by the agent under its contract vest immediately in Defense Plant Corporation and in the United States. Presumably the title and rights obtained by Standard Oil Company under said easement No. 89 vested in Defense Plant Corporation and the United States from and after the date of execution of said easement No. 89 by virtue of the uniform provision contained in the contract between Defense Plant Corporation and its agent.

Counsel concede that the easement relates to "lands possibly in the marginal sea," although they state that

> "We have classified the El Segundo transaction in the 'doubtful' category."[113]

Counsel make the further equivocal and ambiguous remark on the question of whether Santa Monica Bay is "inland water" or "open sea," saying that

> "The area involved was Santa Monica Bay, and, in view of the configuration of the coast at that point, it is not clear whether this area should be regarded as *a true bay*, notwithstanding that it has been held to be such for other purposes. See *People v. Stralla*, 14 Cal. (2d) 617 (1939)."[114]

---

[113]Plaintiff's Brief, page 179, Appendix B, page 231.

[114]Plaintiff's Brief, Appendix B, page 231.

Since counsel for plaintiff infer that the United States may claim that Santa Monica Bay is not an "inland water," it is highly important for this Court to give full weight to the grant of this easement and the request from authorized officers of a Government agency in charge of the project involved. This shows the treatment of the ownership of submerged lands in the marginal sea by the various branches, departments and agencies of the United States.

Counsel comment that the records of Defense Plant Corporation show that the easement was not assignable, and that no interest therein passed to Defense Plant Corporation. The answer to this is that the uniform agreement between Defense Plant Corporation and its agent for the construction and operation of a facility such as the butadiene plant specifically provided that title to any property or interests acquired by the agent should be deemed to vest immediately in Defense Plant Corporation and the United States; and such provisions have been given full effect by the courts for tax and other purposes at the insistence of the United States.[115]

---

[115] *Douglas Aircraft Company v. Byram* (1943), 57 Cal. App. (2d) 311, 314, 134 Pac. (2d) 15, states that:

> "We have no doubt that the materials and parts upon which partial payments had been made became, pursuant to the contract provisions, the property of the Federal Government."

Craig v. Ingalls Shipbuilding Corporation (1942 Miss.), 5 So. (2d) 676.

Counsel comment that this easement was

> "probably taken out of an abundance of caution, in the interest of expediting the defense program, rather than as a result of a studied conclusion that the areas were owned by the State."[116]

The answer to this argument is that attorneys employed by Defense Plant Corporation customarily reviewed each instrument and undoubtedly reviewed this easement and passed upon the title thereto.[117]

7. Numerous Other Grants of Submerged Lands From California to the United States.

A number of additional examples of grants from California to the United States of submerged lands are set forth in the Appendix to the Answer.[118] While these additional grants are of submerged lands lying within bays and harbors, they are worthy of consideration by the Court in this proceeding. They demonstrate the proposition urged in this Brief that there has been a uniformity of treatment by the various departments, branches and agencies of the United States of the title to submerged lands, whether located under the marginal sea or within bays, harbors and ports. This uniform treatment of submerged lands, wherever located within the boundaries of the State, is enlightening as to the true basis of the title to all such submerged lands.

---

[116]Brief, page 179.

[117]It is so alleged in Appendix to Answer, page 156, and as counsel has not contested this allegation, it may be deemed to be true.

[118]Appendix to Answer, pages 157-167.

(III)
Grants From California Municipalities to United States.

The State of California, over a period of the last 40 years, has made a number of individual grants to its several coastal municipalities and counties of all tide and submerged lands lying within their respective municipal boundaries. These grants include, in a number of instances, lands extending three miles into the Pacific Ocean, or under the Pacific Ocean and Bay of San Pedro, or under the Pacific Ocean and Bay of Santa Monica, or under the Pacific Ocean and Santa Barbara Channel, lying along the entire frontage of each respective municipality.[119] These grants are discussed and a map showing some of these grants is set out in the chapter on Prescription, Brief, p. 144.

By Acts of the California Legislature, the municipal grantees of these tide and submerged lands have been authorized to make grants to the United States of portions of the tide and submerged lands within their respective boundaries. One of these Acts, approved May 28, 1913, provides that:

> "Any municipal corporation to which tide lands and submerged lands situate within the boundaries thereof have been granted by the State of California is hereby authorized and empowered to grant portions of such lands to the United States, for purposes of the United States . . ."

provided that a majority of the electors of such municipality approve thereof.[120]

---

[119]Appendix to Answer, pages 742-754.

[120]Cal. Stats. 1913, page 470. See also Cal. Stats. 1929, page 1691. Appendix to Answer, pages 168-169.

A number of grants have been made by these California municipalities to the United States of submerged lands, some of which counsel for plaintiff concede to be in the "open sea," and others of which counsel for plaintiff classify as "doubtful" whether they are under "inland waters," or in the "open sea."

1. City of Newport Beach Grant of Approximately 11 Acres in Marginal Sea.

The City of Newport Beach is a small community of about 3500 inhabitants lying 15 miles south of the City of Long Beach. The California Legislature, in 1919, granted to the City of Newport Beach title to all tide and submerged lands within the boundary of the City. Its boundaries extend by law a distance of three miles into the Pacific Ocean.

Newport Beach has a small inner harbor. In 1934 the United States desired to improve the entrance to this harbor and to build jetties extending out into the Pacific Ocean. The United States requested the City of Newport Beach to grant to it title to lands in the Pacific Ocean necessary for the construction of these jetties at the entrance of the harbor. The citizens of the City, as required by its charter, held an election to determine whether or not they would part with these lands which the City had received from the State. In that election there was submitted to the electors a map showing several parcels of submerged lands lying in the Pacific Ocean entirely outside the entrance of Newport Bay. A copy of this map appears in the Brief, page 5. *Two of these parcels extended into the Pacific Ocean outside of any bay or harbor*

approximately one-third of a mile below low water mark. These two parcels amount to about 11 acres of submerged land in the marginal sea.

The election was held and the citizens voted to grant these five parcels of land to the United States. Thereupon, the United States required that in the deeds from the City to the United States conveying these five parcels of submerged lands, the City should warrant that it

> "is lawfully seized in fee simple of the above-described premises; and that it has a good right to convey the same and that it will forever warrant and defend said property so granted to said grantee."

These deeds were submitted to the United States Attorney General's Office for an opinion on the title, as required by the general legislation of Congress. On February 9, 1934, the War Department advised the representative of the City of Newport Beach that:

> "The United States Attorney General's Office has to approve the title and deeds before fulfillment of the law can be said to have been accomplished . . . Evidences of title are required to be furnished under such rules and regulations as the United States Attorney General may direct, . . . In connection with validity of title, an abstract is preferable. However, if this is too slow and costly, the United States Attorney General would probably be satisfied if the City would secure in lieu thereof . . . a certificate from the City Abstractor, tracing the title from the *State, through the City, to the United States, showing title clear of any claim, incumbrance or prior conveyance.*"[121]

---

[121]Appendix to Answer, pages 172-173.

Correspondence dated May 2, 1934, between the War Department and the City of Newport Beach stated that the United States Attorney at Los Angeles had recommended that the City give a warranty deed in place of a quitclaim deed because

> "he thought that this method of conveyance would be more acceptable *as the State of California has conveyed to the City of Newport Beach certain rights to tidelands and submerged lands along the ocean front and from the City limits of Newport Beach extending three miles from the shore line.*"

The United States Attorney General's Office furnished an opinion that the City of Newport Beach had title in fee simple to these submerged lands which the City had acquired from the State of California and had lawfully voted to grant to the United States, and that the grant was valid and vested good title in the United States.[122] The submerged lands thus granted to the United States were by *warranty deed* and not "quitclaim" as counsel for plaintiff argue generally.[123]

Counsel for plaintiff concede as to the Newport Beach grants that:

"two of the deeds related to lands in the marginal sea" and classify this transaction as "open sea."[124]

---

[122]Appendix to Answer, pages 169-183.

[123]Plaintiff's Brief, page 172.

[124]Plaintiff's Brief, Appendix B, page 232.

Counsel for plaintiff recite the nature of the improvements being made to Newport Bay which gave rise to the necessity for the United States requesting and accepting the execution of these deeds. Then counsel observe that although such deeds were requested by and delivered to the United States,

> "the situation was governed by circumstances peculiar to the particular project,"

and observe that

> "it seems probable that these deeds were accepted merely out of an abundance of caution in meeting the conditions stated in the allotment of the Public Works funds."[125]

Of course, every grant to the United States involves "circumstances peculiar to the particular project." It is also true that the Act of Congress authorizing the allotment of Government funds to the project at Newport Bay Harbor did require "local interests" to furnish free of cost to the United States all necessary rights of way for disposal areas. The particular circumstances that, pursuant to the special requirements of the Act of Congress, the War Department in charge of this project required the City of Newport Beach to execute deeds warranting the title conveyed and granting the submerged lands in fee simple absolute to the United States, does not better the situation any for plaintiff. Indeed, it enhances

---

[125]Plaintiff's Brief, pages 177-178.

the importance of this grant from the State to the United States of lands in the marginal sea which were obtained by the War Department pursuant to the requirements of an Act of Congress.

Counsel assert that

> "no title opinion as required by Section 355 Revised Statutes, seems to have been rendered by the Attorney General"

in connection with the Newport Beach grants; and say that the only action which appears to have been taken by the Attorney General's Office in the approval of the title of the City of Newport Beach for these deeds was a letter from an Assistant United States Attorney in Los Angeles

> "giving qualified approval to the deeds"

on the basis of information received by him from the Office of the District Engineer that

> "Title to these lands was originally in the United States Government, which conveyed it to the State of California."[126]

Counsel's implication that the sole basis of the Attorney General's Office complying with its Congressional duty to examine and render the title opinion was a telephone call from the Engineer's Office is an unworthy effort. As we have mentioned above, the United States Attorney at Los Angeles requested an abstract of title from the New-

---

[126]Plaintiff's Brief, pages 190-191, and Note 42.

port Beach City Attorney on February 9, 1934. The correspondence discussed above between the United States Attorney General's Office and the City Attorney proves conclusively that the Attorney General's Office was furnished with an abstract of title and was fully advised of the legislative grant from the State to the City and of the basis of the State's title. Finally, the United States Attorney General's Office, through its local representative, rendered a favorable title opinion. Presumably this was approved by the Attorney General's Office in Washington.

2. Newport Beach Dredge Deposit Easement.

Pursuant to an appropriation Act of Congress and a report of the Chief of Engineers, the War Department obtained an easement instrument dated August 18, 1934, from the City of Newport Beach covering areas for the disposal or deposit of spoil resulting from dredging Newport Harbor. The location of these disposal areas was in the Pacific Ocean below the line of ordinary high tide and also below low tide on City-owned lands.

This permit-easement contained a covenant on the part of the City that in consideration of the work of improvement being done by the United States, the City

> "Specifically agrees . . . that the said City . . . *is lawfully seized in fee simple of all tidelands and submerged lands of the Pacific Ocean in the City of Newport Beach* . . . ; that it has the legal right to grant permission to said United States of America . . . to dump all dredge materials along its said water front, aforesaid, . . . and that said City of Newport Beach *will forever warrant and defend the title to the said tide or submerged lands, . . . on which dredge materials* may be deposited as aforesaid, . . . "

Said instrument further provided that:

> "It is further understood and agreed that upon the acceptance by the United States of America of this permit, in writing, that the same shall be in full force and effect and be binding legal obligations of the City of Newport Beach."

Said permit-easement instrument was prepared with the assistance and cooperation of the United States Attorney General's Office in conjunction with the City Attorney of the City of Newport Beach. Its language was prepared as the result of conferences held between said attorneys in order to accomplish the requirements of the Acts of Congress that the United States Attorney General pass a favorable opinion on instruments of that character.[127]

Counsel for plaintiff lump this disposal permit-easement with the warranty deeds to the submerged lands in the marginal sea and treat them all as one transaction in counting the number of transactions. In Appendix B to plaintiff's Brief, counsel for plaintiff do not even mention this separate instrument and do not count it separately nor classify it.

Counsel for plaintiff say that

> "The language of the disposal permit (War. Dept. File: 7245 (Newport B., Calif.) 56/6) indicates that it actually covered only tidelands and uplands belonging to the City."[128]

---

[127]Appendix to Answer, pages 182-183.

[128]Plaintiff's Brief, page 178, Note 35.

Counsel err in saying that it covers "upland belonging to the City," since the City owns only land below ordinary high water mark under the grant of tide and submerged lands from the State of California to the City. Counsel also err in implying that no submerged lands were involved, as they overlook the language of the warranty-covenant in this permit-easement above quoted in which the Attorney General's Office and the City Attorney carefully included the warranty of "*submerged lands* of the Pacific Ocean in the City of Newport Beach" as well as of "tidelands," clearly evidencing that the easement covered lands lying below low water mark in the marginal sea as well as the adjoining foreshore.

3. City of Long Beach Grants to the United States of Submerged Lands in the Pacific Ocean and Bay of San Pedro.

There has been a history of dealings between the City of Long Beach and the United States over the last 25 years in connection with the construction of the Outer Harbor of Long Beach.

(a) Long Beach Oceanward Boundary.

The westerly boundary of the City for many years has been *a line three miles oceanward* from and parallel with "the line of ordinary high tide of the Pacific Ocean."[129]

---

[129]Appendix to Answer, page 185.

(b) Submerged Land Grant From the State to City.

On May 1, 1911, the State granted to the City all tide and submerged lands situated within the boundary of said City in trust for harbor and park purposes. This legislative grant has been amended from time to time since the year 1911. The Supreme Court of the State of California adjudicated that fee simple title to all tide and submerged lands within said municipal boundaries was granted by the State to the City.[130]

(c) Outer Harbor of Long Beach.

In the year 1924 the City undertook a program for the construction of its Outer Harbor. This harbor is located entirely seaward of the line of ordinary high tide along the ocean shore of its Harbor District. The creation of this Outer Harbor was the subject of investigations and proceedings not only by local interests, but also by the United States War Department, through its Secretary of War, Chief of Engineers, Board of Engineers, Division Engineer, and its United States District Engineer Office.[131]

In fact, the Chief of Engineers reported to the Secretary of War and the Congress, in 1924, recommending

---

[130]Appendix to Answer, pages 186-187; Cal. Stats. 1911, page 1304; Cal. Stats. 1925, page 235; Cal. Stats. 1935, page 793. *Marshall v. City of Long Beach* (1938), 11 Cal. (2d) 609, 614, 82 Pac. (2d) 362.

[131]Appendix to Answer, pages 187-190.

the extension of the breakwater from the Outer Harbor of Los Angeles around the proposed Outer Harbor of Long Beach, and in said report stated that the breakwater extension and other harbor improvements would result in the reclamation of approximately 1000 acres of submerged lands from the ocean in front of Terminal Island, and stated that:

> "Title to this valuable frontage would rest in the Cities of Los Angeles and Long Beach."

Pursuant to this report, Congress passed the Act of March 3, 1925, adopting the written report and recommendations of the Chief of Engineers and appropriating funds for the construction of said breakwater extension from the Los Angeles Outer Harbor to the proposed Long Beach Outer Harbor; and *conditioned the appropriation upon the Chief of Engineers' allowing credits to local interests, including the City of Long Beach, for such work as they might thereafter do on the construction of the breakwater extensions.*[132] Pursuant thereto, the people of the City of Long Beach voted the issuance of $5,000,000 of bonds for the construction of improvements in the Outer Harbor. With the proceeds of this bond issue, the City of Long Beach constructed its Outer Harbor. As a part of these improvements, at its own expense, the City constructed 4,200 feet of the said breakwater, expending the sum of $906,000 therefor, for which the War Depart-

---

[132]Appendix to Answer, pages 188-193.

ment thereafter gave the City credit, pursuant to the Act of Congress.[133]

In the year 1928, the people of the City of Long Beach held an election authorizing an additional $2,700,000 for enlargement and completion of improvements in its Outer Harbor. With the proceeds of these bonds, it constructed piers, wharves, dredged channels, and made other improvements therein, all of which was reported to Congress by the Chief of Engineers and Secretary of War.[134]

The improvements constructed by the City in its Outer Harbor with the proceeds from these bond issues, included the construction, as a part of the main breakwater, of what is known as "Victory Pier," hereinafter mentioned as being leased to the United States.[135]

The map of Long Beach Harbor set out in the Brief (*supra*, p. 5), graphically portrays the Long Beach Outer Harbor and some of its improvements.[136]

(d) Victory Pier Lease to the United States.

Thirty acres of submerged lands owned by the City of Long Beach in its Outer Harbor commonly known as "Victory Pier" were leased to the United States by the City by instrument dated October 8, 1943. Victory Pier is that portion of the Long Beach breakwater extending into the Pacific Ocean and Bay of San Pedro a distance of approximately 4,690 feet or over three-quarters of a mile. The lease was executed on a form prepared by

---

[133]Appendix to Answer, pages 194-198.

[134]Appendix to Answer, pages 198-203.

[135]Appendix to Answer, page 203.

[136]See maps showing progressive development of Long Beach Harbor: Appendix to Answer, page 194; page 202; page 206.

the United States, known as "United States Standard Form No. 2, Revised, approved by the Secretary of the Treasury on May 6, 1935." This lease granted the United States the right at its expense to construct facilities on the breakwater. The lease was to run for a term of approximately four years at a rental of $1 and with the right to renew for a five-year period upon the rental of an additional sum of $1, but with the lease to expire two years after termination of the state of war.

This lease contained a covenant that upon termination of the lease, the City agreed to purchase from the Government all permanent improvements and additions constructed by the United States upon the leased premises at a price and upon terms of payment to be negotiated at the time of purchase.

The United States went into possession of the thirty-acre parcel of submerged lands in the Pacific Ocean and Bay of San Pedro in 1943 under the terms of this lease and has remained in possession ever since, having constructed marine and storage facilities thereon costing the United States in excess of $3,100,000.

The location of Victory Pier is shown on the map of Long Beach and Los Angeles Harbors set out in the Brief (supra, p. 5).[137]

Presumably the United States Attorney General's Office rendered an opinion approving the title of the City of Long Beach to the demised premises prior to execution by the United States of the lease instrument and pursuant to which the United States has expended in excess of $3,100,000 on improvements."

---

[137] Appendix to Answer, pages 203-206.

The only observation that counsel for plaintiff have to make on this Victory Pier lease, with its very formal recognition of the City's title, is that it involved

> "formerly tide and submerged lands in Long Beach Harbor within San Pedro Bay, leased by United States"

and place it under the classification of "doubtful."[138]

(e) Four Additional Leases or Permits From City of Long Beach.

Four additional parcels of submerged lands or reclaimed submerged lands lying in the Pacific Ocean and Bay of San Pedro within the Outer Harbor of the City of Long Beach were leased to the United States during the period from 1937 through 1943. Each of these four instruments provided for the payment of rental to the City. Rental was paid by the United States to the City in accordance with the rent covenant of these leases or permits. Each instrument recognized the lessor as owner of the demised premises. Attorneys for the United States examined the title to the demised premises and presumably furnished the United States with opinions in each case approving the title of the City.[139] These four instruments are placed in the "doubtful" category by plaintiff.[140]

---

[138]Plaintiff's Brief, Appendix B, page 232.

[139]Appendix to Answer, pages 207-215.

[140]Plaintiff's Brief, Appendix B, pages 232-233.

(f) Long Beach Offshore Petroleum Development —With Full Knowledge of Congress.

It is not inappropriate to mention the drilling and production of oil by the City of Long Beach in its Outer Harbor extending at least one-half mile into the Pacific Ocean and Bay of San Pedro, although this did not involve an actual grant from the City to the United States. In the spring of 1939, the City let contracts for the drilling and production on its behalf of oil from under its Outer Harbor area in the Pacific Ocean and Bay of San Pedro. *The Committee on Public Lands of the United States Senate was in 1939 fully advised by the City Attorney of Long Beach of this contemplated program,* prior to the City commencing its drilling operations. The Senate Committee was then told of the City's ownership of the submerged lands out to the three-mile limit; of the letting of contracts to drill wells and produce oil from this area; and of the past recognitions by various branches and departments of the United States of the City's ownership of this area. Nevertheless, Congress rejected a request by the Navy Department that Congress adopt a resolution asserting ownership of this area and directing that suit be instituted to determine such ownership. The City of Long Beach has since caused approximately 200 oil wells to be drilled in and under its Outer Harbor in the Pacific Ocean and Bay of San Pedro and has been and is now producing large quantities of oil and gas therefrom. All revenues derived therefrom are required under its Charter to be expended solely for harbor improvement purposes.[141]

---

[141] Appendix to Answer, pages 217-221.

(g) Comments of Counsel for Plaintiff on City of Long Beach Submerged Land Grants.

We do not know from plaintiff's brief whether plaintiff will ultimately claim that the Outer Harbor of Long Beach is a part of the marginal or open sea, or constitutes an "inland water." We are told in one place in the brief that the Long Beach Outer Harbor is considered "doubtful" as to whether it should be classified as a "true bay" or as "inland waters";[142] while in another place in plaintiff's brief, in discussing certain Acts of Congress recognizing city ownership of submerged lands located therein, we are told that the grants of submerged lands in the Pacific Ocean and Bay of San Pedro "relate to land situated in either a bay or a harbor," without any qualifications;[143] and in still another place in plaintiff's brief, when seeking to explain away opinions of predecessors in the Attorney General's Office relating to grants in the Pacific Ocean and Bay of San Pedro, we are flatly told that they are irrelevant because the lands involved are "situated in Los Angeles Harbor, San Pedro Bay," or "in Los Angeles and Long Beach Harbors."[144]

---

[142]Plaintiff's Brief, Appendix B, page 232; 228, classifying the grants in the Pacific Ocean and Bay of San Pedro as "doubtful." Also commenting (p. 228) that:

> "It is not clear whether San Pedro Bay is to be regarded as *a true bay*, or as open sea. However, the area has been held to be inland waters in *United States v. Carrillo*, 13 F. Supp. 121 (S. D. Cal.)."

[143]Plaintiff's Brief, pages 188-189.

[144]Plaintiff's Brief, page 190, Footnote 41a; page 192, Footnote 43.

The real difficulty in this connection lies in the fact that these two Outer Harbors have been constructed by works of man in front of a long, sweeping shoreline within what has historically been known as San Pedro Bay. This Bay has one prominent northwesterly headland. But there has been some uncertainty in determining a southeasterly headland. While the United States District Court in 1935 held that San Pedro Bay, in which Los Angeles and Long Beach Outer Harbors are situated, was a bay for the purposes of determining the State boundary in connection with the application of State criminal laws to a ship anchored off the coast (*United States v. Carrillo* (D. C. Cal 1935), 13 Fed. Supp. 121), plaintiff is apparently unwilling to accept that decision as a final determination of the question. In addition, the exact boundaries of San Pedro Bay have never been determined, in view of the difficulty of fixing a southern headland for this bay. See the map in the official report of *People v. Stralla* (1939), 14 Cal. (2d) 617, 621, showing the physical conditions relative to locating a southeasterly headland to San Pedro Bay.

This same inconsistency of plaintiff with respect to the Outer Harbors of Los Angeles and Long Beach is reflected by these two matters:

(i) In 1940 the Department of Justice, presumably upon instructions of the Attorney General, filed suit on behalf of the United States against the Cities of Los Angeles and Long Beach to condemn 333.6 acres, then partly submerged below low water mark

and partly reclaimed and filled land that prior to 1906 had all been below the line of low water mark on the Pacific Ocean side of Terminal Island which is now in the Outer Harbor Districts of Los Angeles and Long Beach. In the complaint, the United States alleged that those lands were, in their natural state, submerged lands. That suit was ultimately settled by a stipulation in which the United States specifically reserved the right to claim ownership of the entire 333.6 acres in any future litigation.[145]

(ii) Again the Department of the Interior has refused and now refuses to reject numerous applications for oil and gas leases filed by individuals with the Department purportedly pursuant to the Leasing Act of February 25, 1920, as amended, covering large portions of the submerged lands in the Outer Harbors of Los Angeles and Long Beach. Some of these applications, and maps showing their location, are set forth in the application for leave to intervene, filed by Robert E. Lee Jordan in this proceeding, Original No. 12.[146]

---

[145]*"United States of America v. 333.6 Acres,"* No. 1102-Civil, United States District Court for the Southern District of California, complaint filed August 9, 1940.

Stipulation filed in No. 1102-Civil on December 17, 1940, signed on behalf of the United States by Norman M. Littell, Assistant Attorney General, reserved to the United States as follows:

> ". . . the rights of the United States are not thereby prejudiced against asserting ownership or rights in said oil and other mineral deposits [in or under said 333.6 acres] in any other suit before any court of competent jurisdiction;"

Said reservation was carried into the final judgment in said proceeding entered December 17, 1940, in Book No. 4, page 150, of Judgments of the United States District Court for the Southern District of California.

[146]Order denying Jordan leave to intervene, dated December 23, 1946.

4. City of Los Angeles Grants to the United States of Submerged Lands in the Pacific Ocean and Bay of San Pedro.

The relations between the United States and the City of Los Angeles over the last forty or fifty years in the construction of the Outer Harbor of that City have resulted in numerous instances of recognition by the various branches and departments of the United States that the City, as successor to the State of California, is the owner of all the submerged lands within the Pacific Ocean and Bay of San Pedro lying within its City boundaries. A number of grants have been made of portions of these submerged lands by the City to the United States.

The inconsistent treatment by counsel for plaintiff in their brief, by the Attorney General's Office, and by the Department of the Interior, as to whether or not the Bay of San Pedro, within which the Outer Harbor of Los Angeles is located, is a "true bay" or is a part of the marginal sea, is discussed in the preceding section on Long Beach.

(a) Los Angeles Oceanward Boundary.

The westerly boundary of the City has been since about the year 1906, and is now a line in the Pacific Ocean coincident with the boundary of the State of California.[147]

---

[147]Appendix to Answer, pages 223-224.

(b) Legislative Grant of Submerged Lands to the City of Los Angeles.

On May 1, 1911, the State of California granted to the City the title of the State

> "held by said State by virtue of its sovereignty, in and to all tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said City, and situated below the line of mean high tide of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries"

to be held in trust for harbor purposes. Said Act was subsequently amended, with the enlargement of the coastal boundaries of the City, so as to grant to the City all tide and submerged lands within its westerly and southwesterly boundaries as established from time to time and as presently established.[148]

(c) Outer Harbor of Los Angeles.

The Outer Harbor of Los Angeles consists of the most westerly portion of the Pacific Ocean and Bay of San Pedro. Its construction commenced with the main breakwater built in 1898-1912. Many improvements, structures and facilities have been constructed, and much reclamation has taken place, in this Outer Harbor over the last fifty years or more. Much of the construction of this Outer Harbor has been done in conjunction with the United States, with its full knowledge and approval, and under Acts of Congress numbering more than forty Acts.[149]

---

[148]Cal. Stats. 1911, page 1256; Cal. Stats. 1917, page 159; Cal. Stats. 1929, page 1085. Appendix to Answer, page 224.

[149]Appendix to Answer, pages 225-233.

(d) 1903 EASEMENT TO WAR DEPARTMENT.

On April 30, 1903, a written easement was granted to the United States War Department to lay pipes across an area, including submerged lands, and to deposit dredged materials within a 70-acre tract of submerged lands lying below low water mark adjacent to the westerly end of Terminal Island, constituting the then shore of the Pacific Ocean and Bay of San Pedro. This easement was granted to the United States by a lessee under lease from the predecessor of the City of Los Angeles. This lease of 70 acres of submerged lands was made with the specific approval of the Legislature of the State of California. Under said lease, the lessee was required to construct a seawall around said 70-acre parcel of submerged lands and to fill in and reclaim the same. This was done with the knowledge, cooperation and assistance of the War Department. As a result, this 70-acre parcel of submerged land was ultimately reclaimed and remained in the possession of said lessee, until portions thereof were surrendered back to the City. This reclamation was reported to Congress in 1914. Portions thereof were later granted to the United States by the City of Los Angeles as a part of the 61.98-acre parcel exchange between the City and the United States hereinafter discussed.[150]

Counsel for plaintiff classify this easement as "doubtful" whether it is "open sea" or "inland waters" and simply say that

"the entire area is within San Pedro Bay."[151]

---

[150]Appendix to Answer, pages 233-245.

[151]Plaintiff's Brief, Appendix B, page 233.

(c) Four Leases of Municipal Pier No. 1.

An area of approximately 40 acres of submerged lands lying below low water mark in the Pacific Ocean and Bay of San Pedro on the westerly extremity of said Bay was bulkheaded and thereafter filled and reclaimed by or on behalf of the City commencing in the year 1905. Municipal Pier No. 1 was then constructed on this reclaimed 40 acres at a cost of approximately $3,000,000. Bonds in that amount were voted to be issued by the electors of the City in 1910 for this purpose. The proceeds from these bonds were mainly expended for the reclamation of the 40 acres and the construction of Municipal Pier No. 1. This reclamation and construction of the pier were done with the full knowledge of the War Department, and it was reported to the Congress, through the Secretary of War, in the year 1914.[152]

In 1917, the United States, through its Secretary of the Navy, took over the entire use of Municipal Pier No. 1 with three lease instruments being executed between the City and the United States in connection therewith.

At the close of World War I, the United States vacated Municipal Pier No. 1 at the request of the City and returned possession to the City.

In 1934, the City granted to the United States revocable lease permits to use portions of Municipal Pier No. 1, and these permits have been renewed periodically from time to time thereafter.[153]

Plaintiff's counsel simply comment on these transactions by saying that:

> "Leases of portions of Municipal Pier No. 1. in Los Angeles Harbor. within San Pedro Bay."[154]

---

[152]Appendix to Answer, pages 250-254.
[153]Appendix to Answer, pages 254-255.
[154]Plaintiff's Brief, Appendix B, page 233.

(f) Outer Harbor Dock and Wharf Company Lease to the United States.

A 132-acre parcel of submerged lands lying in the Pacific Ocean and Bay of San Pedro, at the westerly extremity of the Bay, were leased by the predecessor of the City to Outer Harbor Dock and Wharf Company in the year 1906. This lease was made with the specific approval of the Legislature of the State of California. Pursuant to the covenants of the lease, the lessee thereunder constructed a bulkhead and retaining wall in the Pacific Ocean and Bay of San Pedro enclosing substantial portions of said 132-acre parcel and then filled in and reclaimed said parcel. The lessee erected piers and wharves and dredged channels in said 132-acre parcel, and expended in excess of $1,300,000 in its improvement. The reclamation of this area and construction of the improvements thereon were done with the full knowledge of the United States through its Secretary of War, who, in turn, made a detailed report thereof to the Congress in 1914.[155]

Several leases have been made to the United States, its Navy Department, and other departments and agencies, by Outer Harbor Dock and Wharf Company of substantial portions of the leasehold property and improvements covering said 132-acre parcel of reclaimed submerged lands.[156]

---

[155] Appendix to Answer, pages 255-259.

[156] Appendix to Answer, page 259.

The comments of counsel for plaintiff in connection with these leases simply are that

> "This pier is located in Los Angeles Harbor, within San Pedro Bay."[157]

(g) 9.75-Acre Grant to the United States.

In improving the Outer Harbor of Los Angeles, it became necessary to remove a portion of Deadman's Island, resulting in a loss to the United States of a 9.75-acre parcel of submerged lands granted to it by the State under Act of March 9, 1897, heretofore discussed. This necessitated a grant from the City to the United States of an equivalent area of submerged lands.

Congress, by Act of July 25, 1912, authorized the exchange of this 9.75-acre parcel of submerged lands. It thereby authorized the Secretary of War to grant to the City the title of the United States to the 9.75-acre parcel of submerged lands around Deadman's Island, therein stated as having been

> "acquired under an Act of Legislature of the State of California, approved March 9, 1897,"

in exchange for the grant by the City to the United States of an

> "equal area of submerged lands of said City,"

lying adjacent to and in front of the San Pedro (Fort McArthur) Military Reservation.

The United States required the City to furnish an abstract of title to the 9.75-acre parcel to be conveyed to the United States in this exchange. The City Attorney furnished the Attorney General of the United States with

---

[157]Plaintiff's Brief, Appendix B, page 233.

a complete history of the City's title to the submerged lands in the Pacific Ocean and Bay of San Pedro as grantee from the State of California, and said that:

> "*With reference to the title of the City of Los Angeles to the submerged lands* included within the rectangular area lying easterly of Deadmans Island which the government proposes to reclaim and use for general public purposes, *the rectangle, as you know, includes a portion of the submerged lands ceded to the United States for military purposes under the 1897 act* referred to above lying within 300 yards of the low tide line of the Island. I have in my files a copy of the *map recorded by the federal engineer accepting and claiming the submerged land surrounding Deadmans Island under authority of the act of 1897*, so that there can be no question but what at that time *the government was satisfied with the state's authority to cede the submerged lands under the 1897 act.*"[158]

The City Attorney further advised the United States Attorney General in that same report that:

> ". . . the transcript and certificate sent you show that the State of California granted to the City of Los Angeles May 1, 1911, all of the right, title and interest *held by the state by virtue of its sovereignty in and to this particular submerged land as well as all other tide and submerged lands within the limits of the city* . . . it is a matter of tideland law

---

[158] Appendix to Answer, page 279.

and not of statute law that *the United States held title to the tide and submerged lands in trust for the benefit of the states which were later formed along its boundaries, so that upon the admission of California to the Union in 1850 the title to these lands was vested in the state by virtue of its sovereignty until granted to the City of Los Angeles in 1911.*"[159]

On the basis of this abstract of title and opinion data furnished by the City Attorney, it was reported to him by the Attorney General's Office that

". . . *the Attorney General has passed the title of the City of Los Angeles to the 9.75 acres of land in the outer harbor . . . and has found the title good.*"

The City of Los Angeles executed its deed dated August 16, 1913, granting to the United States this 9.75-acre parcel of submerged lands with the granting clause providing that it

"grants and conveys to the United States, its successors and assigns, all that portion of the *submerged lands belonging to said city . . .*"

This deed was recorded at the request of the United States in the Los Angeles County Recorder's Office.

Concurrently with the delivery of this deed, the Secretary of War executed and delivered a deed whereby the United States granted to the City title to a 9.75-acre parcel of submerged lands. This deed is dated September 3, 1915; recites the authority of the Secretary of War under the

---

[159]Appendix to Answer, pages 279-280.

Act of Congress of July 25, 1912; recites that the City has by deed conveyed to the United States an equal area of submerged lands

> "and the *title to the land so conveyed to the United States has been approved by the Attorney General of the United States.*"

The granting clause of the deed granted to the City the title of the United States

> ". . . in and to that portion of the submerged lands around the military reservation of Deadmans Island . . . acquired under Act of the Legislature of the State of California, approved March 9, 1897, . . ."

Counsel for plaintiff now merely summarize this transaction, and say that

> "Both tracts were situated in Los Angeles Harbor, within San Pedro Bay,"

and classify this exchange in the "doubtful" column.[160]

(h) 61.98-Acre Exchange.

In the further improvement of the Outer Harbor of Los Angeles, it became necessary to remove completely the balance of Deadmans Island. To make up this further loss to the United States of its land on and around Deadmans Island, the City deeded an equivalent area of submerged lands adjoining and easterly of Deadmans Island.

In 1924, this proposed exchange was reported to Congress by the Secretary of War. In this report, Congress was again advised of the 1897 grant by the State to the United States of the 300-yard strip of submerged lands around Deadmans Island. By Act of March 3, 1925, Congress adopted this report and authorized the exchange

[160]Plaintiff's Brief, Appendix B, pages 233-234.

on condition that the City grant to the United States a 61.98 acre area of submerged lands.

The City ordinance authorizing the grant, approved by the City electors, recited that the improvement and dredging away of Deadmans Island (then known as Reservation Point) would so result that

> "the United States will thereby *ipso facto* become divested of title to the tide and submerged lands surrounding Reservation Point acquired pursuant to said Act of the legislature of the State of California approved March 9, 1897, by reason of the same being abandoned for military, naval or defense purposes. . . ."

On August 4, 1926, the City executed a grant deed to the United States reading, in part, that:

> ". . . The City of Los Angeles . . . hereby grants and conveys to the United States of America that certain parcel of tide and *submerged land belonging to the City of Los Angeles* . . ."

On September 6, 1927, the United States accepted this deed in writing and recorded it in the Office of the Los Angeles County Recorder.

The title to this 61.98-acre parcel was reviewed by the United States Attorney General's Office after obtaining an abstract of title and a title opinion from the City Attorney of the City, who again reported in detail to the United States Attorney General the source of the City's title through the State of California and that the latter acquired it by virtue of its sovereignty upon its admission into the Union. Attorney General William D. Mitchell

approved the title of the City to these submerged lands in his written opinion dated June 30, 1927 stating that,

> "I find the title to said land in the City of Los Angeles."[161]

Counsel for plaintiff merely summarized this exchange in one sentence and classified it in the "doubtful" column.[162]

(i) Submarine Base Site.

Pursuant to direction of an Act of Congress, the Navy Department reported to Congress in 1917 on the availability of sites needed for the Navy. In this report, eight sites were considered in the Los Angeles Harbor, three of them being in the Pacific Ocean and Bay of San Pedro in the Outer Harbor of Los Angeles. Title to these sites were reported to Congress by the Navy Department as

> "vested in the City of Los Angeles by cession by the State of California;"[163]

The map of these sites contained in the Navy Department report to Congress is set out in the Appendix to the Answer.[164]

Site No. 1 of these eight sites was recommended by the Navy Department to Congress for acquisition, reporting that:

> "In common with each of the other sites noted, Site No. 1 is composed of tide and submerged lands

---

[161] Appendix to Answer, pages 269-283.
[162] Plaintiff's Brief, Appendix B, page 234.
[163] Appendix to Answer, page 285.
[164] Appendix to Answer, page 288.

> requiring reclamation in order to make it suitable for use. . . . Of the 166 acres about 130 lie above the 18-foot contour, as regards depth at mean lower low water, and would require fill. . . . Title in City of Los Angeles in Trust for people, etc., by virtue of California Statutes 1911, 1256, for tide and submerged lands."

It was also reported that the City had offered to cede Site No. 1 to the United States without charge.

At the request of the Navy Department, on June 5, 1917, the electors of the City approved the grant of this tract of submerged lands to the United States for a Submarine Base. Following this election, the Secretary of the Navy, Josephus Daniels, telegraphed the City, acknowledging with appreciation on behalf of the United States the action of the people of the City.

Following the election, the Solicitor of the Navy Department on November 15, 1917, requested the City to furnish the United States an abstract of title to the Submarine Base Site, in order that it might be furnished to the Attorney General of the United States for his approval under the Act of Congress. The City furnished the Solicitor the requested abstract of title, including a complete set of all the proceedings leading up to and including the ordinance and the election, copies of the legislative grant from the State to the City of 1911 conveying all tide and submerged lands within the City boundaries, and the Act of the California Legislature of 1913 authorizing municipalities to grant to the United States portions of the submerged lands granted by the State to the municipalities.

On December 26, 1917, the City Council adopted an ordinance thereby granting to the United States the Submarine Base and also authorized its Mayor to execute a deed confirming the grant. Said ordinance provided in part, as follows:

> "There is hereby conveyed to the United States of America, . . . that certain parcel of tide and submerged lands of the City of Los Angeles . . . [Describing the Submarine Base Site]."

A copy of this ordinance was delivered to the Navy Department, together with the abstract of title. Several years thereafter elapsed during which time the United States failed to indicate to the City that further steps were desired to be taken by the United States. Following the close of World War I, the project having been abandoned by the Navy Department, the City Council adopted a further ordinance reciting all the facts and thereupon revoked the grant to the United States of this Submarine Base Site.[165]

Counsel for plaintiff merely state that this Submarine Base Site

> "transfer was not consummated,"

and fail to make any classification whatever of this transaction. Counsel for plaintiff entirely omit this transaction in counting up the number of transactions between the United States in arriving at their so-called total of 197.[166]

---

[165] Appendix to Answer, pages 284-294.

[166] Plaintiff's Brief, Appendix B, page 234.

(j) Two "Area D" Permits.

In 1937, the United States, through its War Department, requested the City to grant to the United States a permit to construct a retaining dike in the Pacific Ocean and Bay of San Pedro, adjoining the front of Fort MacArthur. The application referred to the area in question as "Area D" and as being a "piece of city-owned land." This request was granted and a written permit was issued on May 5, 1937, by the City to the United States, specifying that:

> "No property rights are conveyed to applicant in the parcel of *City owned land* for which permission to fill with dredge spoil is granted"

and required written acceptance of the permit. This written acceptance was thereupon executed by the War Department.

A further application for a similar permit was made in the year 1938 by the War Department, to enlarge Area D. This application likewise referred to the Area as "city owned submerged lands." The further application was granted and a permit was issued by the City to the United States on April 13, 1938, containing the same conditions as above mentioned, and written acceptance thereof was executed by the War Department.[167]

The mere observation of counsel for plaintiff on the grant of these two permits, lumping them together as one transaction, is

> "Area involved was adjacent to Fort MacArthur in Los Angeles Harbor, within San Pedro Bay,"

and classify in the "doubtful" column.[168]

---

[167]Appendix to Answer, pages 294-297.

[168]Plaintiff's Brief, Appendix B, page 234.

(k) Reeves Field Leases.

In the report of the Navy Department to Congress in 1917 above mentioned, after reviewing available sites needed by the Navy, a reclaimed area of former submerged lands of the Pacific Ocean and Bay of San Pedro is described as "Parcel No. 8" and as containing 152 acres. This report to Congress described the title to Parcel No. 8 as being

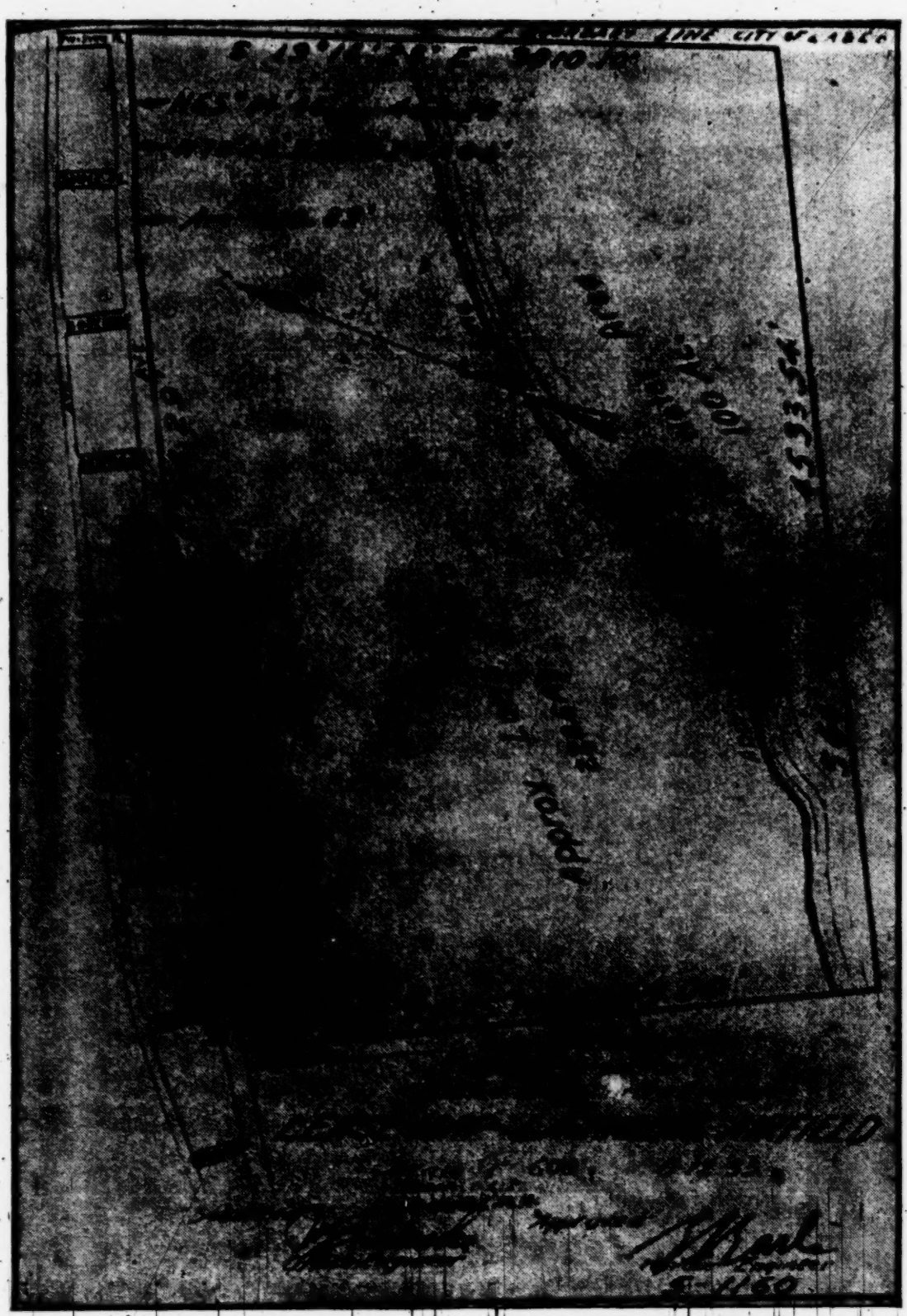
> "vested in the City of Los Angeles by cession from the State of California."

Thereafter, in the year 1928, the United States Navy Department requested the City to make available this same 152-acre parcel of reclaimed lands on Terminal Island, formerly submerged lands, and an additional adjoining area of existing submerged lands, lying below low water mark in the Pacific Ocean and Bay of San Pedro. The Navy requested the City to convert this area into an airport and to permit the Navy to use it for aviation purposes. Following this request, the City converted this area, together with additional portions of the submerged lands thereafter reclaimed, into an airport, expending in excess of $1,000,000 for that purpose. The Navy Department, during the years 1928 and 1929, with permission from the City of Los Angeles, made use of the airport facilities. This area was then known as "Reeves Field."

In 1933, the United States Coast Guard entered into a written lease with the City of Los Angeles for a one-year period, leasing a portion of Reeves Field.

The Acting Secretary of the Navy on July 18, 1935, made written application to the City for a permit to use

BLANK
PAGE



Reeves Field. This application requested a right to use for a period of not exceeding thirty years

> "those certain lands at Los Angeles Harbor, *belonging to the City of Los Angeles,* as shown on map attached hereto . . . as an airport for the use of the Fleet."

A copy of this map is set opposite this page.

The City thereupon executed a Permit-Lease with the United States, reciting that:

> "Whereas the United States of America, through the Navy Department, has submitted an application to the Los Angeles Harbor Department, City of Los Angeles, California, for permission to use a site on Terminal Island *owned by said City of Los Angeles,* as an airport."

Said lease granted to the United States permission to occupy and use

> "the following described lands on Terminal Island *owned by the City of Los Angeles,* California,"

particularly describing the leased premises and reciting that it contained 328.5 acres, more or less. *Approximately 100 acres thereof was on the date of execution of said Permit-Lease under the waters of the Pacific Ocean and Bay of San Pedro.* This lease was executed and accepted on behalf of the United States by the Acting Secretary of the Navy, acknowledging all the terms and conditions

thereof, said acceptance being attached as a part of the lease and reading as follows:

> "This Permit is executed on behalf of the United States by the Secretary of the Navy in *acknowledgment* of the acceptance of the terms and conditions therein set forth.
>
> "United States of America
> H. R. Stark (Signed)
> "Acting Secretary of the Navy."

Attached to this lease is the map, copy of which is set opposite the preceding page, which delineates a line shown thereon as

"Approx. Mean High Tide Line,"

with a delineation of the area oceanward of said line bearing the legend

"Approx. Water Area 100 Ac."

This lease was renewed annually thereafter through June 30, 1940.[169]

Counsel for plaintiff merely summarize these Reeves Field transactions and classify them in the "doubtful" column.[170]

(l) Navy Landing Permit—Former Submarine Base Site.

In 1932, the City issued to the United States Navy Department, at the latter's request, a written revocable permit granting the use and occupancy of a portion of the submerged lands in the Pacific Ocean and Bay of San Pedro at its westerly extremity in the area formerly known as

---

[169] Appendix to Answer, pages 297-303.

[170] Plaintiff's Brief, Appendix B, page 235.

the "Submarine Base Site" discussed above. Thereafter, this revocable permit was superseded by other like revocable permits from the City to the United States. The Navy Department has been in possession and occupied these portions of the submerged lands in the former Submarine Base Site under these permits. Annual rental has been paid by the United States to the City for the use and occupation of these submerged land areas pursuant to the terms of these permits. Each of these permits contained a provision reading that:

> "Permission is hereby granted to the United States Navy Department to occupy and use the following described lands in Los Angeles Harbor, *owned by the City of Los Angeles,* for the uses and purposes and subject to the terms and conditions hereinafter set forth."[171]

Counsel for plaintiff merely say, as to this transaction:

> "A pier located south of Fort MacArthur near beginning of breakwater, Los Angeles Harbor, within San Pedro Bay. Occupied under a revocable lease permit."[172]

(m) Other Submerged Land Grants and Leases From the City of Los Angeles to the United States.

There have been many other grants, leases, easements and licenses executed and delivered by the City of Los Angeles to the United States and its various departments, branches and agencies. Most of these additional ones are located within the Inner Harbor of Los Angeles. Some of

---

[171]Appendix to Answer, pages 303-305.

[172]Plaintiff's Brief, Appendix B, page 235.

them are detailed in the Appendix to the Answer.[173] Plaintiff's counsel classify each of the Inner Harbor grants, leases, licenses, condemnation suits, etc., in their column entitled "inland waters or tidelands." These transactions are of significance in this case, however, as again demonstrating the identity of treatment and recognition of the title to submerged lands below low water mark whether the lands are situated in the marginal or "open" sea or in bays, ports or harbors.

5. City of Santa Barbara Grants and Leases to the United States of Submerged Lands in the Pacific Ocean and Santa Barbara Channel.

(a) Oceanward Boundary of Santa Barbara.

The southwesterly boundary of the City of Santa Barbara is a line in the Pacific Ocean and Santa Barbara Channel one-half mile distant from and parallel with the shore of the Ocean, running the entire length of the City.[174]

(b) Grant of Tide and Submerged Lands From State to City.

By Act of the California Legislature in 1925, as amended from time to time thereafter, the State granted to the City the title of the State

> "held by said State by virtue of its sovereignty in and to all the tidelands and submerged lands (whether filled or unfilled) situated in and upon that portion of the Pacific Ocean, known as Santa Barbara Channel,"

---

[173]Appendix to Answer, pages 306-319.

[174]Appendix to Answer, pages 321-322.

lying within the corporate limits of the City, for harbor and park purposes, reserving to the State all deposits of minerals, including oil and gas, in the granted lands.[175]

(c) Construction of Breakwater.

Before 1926 there was an open roadstead from Santa Barbara Point eastward a distance of about four miles, afforded natural protection from the Channel Islands distant offshore from 25 to 40 miles. In 1926-1929 the City constructed a breakwater located off Point Castillo on the west side of the City. This breakwater is roughly L-shaped with its longer arm extending nearly parallel to the shoreline, being constructed in depths of about 25 feet below low water. The western end of the outer arm, about 1,000 feet long, is connected with the shore at Point Castillo.

Immediately following the construction of the breakwater, a large fill occurred westward and seaward of the shore arm of the breakwater. This fill is about 1,000 feet wide by about 4,500 feet long. Most of this fill was below the line of low water mark as it existed prior to construction of the breakwater.[176]

(d) Four Grants and Leases to the United States.

The City made four separate leases or grants to the United States in 1940-1942 of parcels of this submerged land filled oceanward against the breakwater as above mentioned.

---

[175]Appendix to Answer, pages 322-324.

[176]House Document No. 552, 75th Congress, 3rd Session, pages 3, 7, 8, 18, 19.

Typical of these four grants and leases is the one requested by the Navy Department and authorized by Act of the Legislature of the State of California approved December 7, 1940.[177] Said Act of the Legislature particularly described a .918-acre parcel and authorized the City to grant the same to the United States, and declared it to be an emergency measure. The City executed the deed dated February 26, 1942, granting said .918-acre parcel of a former part of the Pacific Ocean and Santa Barbara Channel.

The United States, through its Navy Department, on February 18, 1942, wrote the City requesting it to furnish the United States a preliminary certificate of title for submission to the Attorney General of the United States for his opinion as to the validity of the title. Presumably, the Attorney General of the United States passed a favorable opinion that the title to these former tide and submerged lands was vested in the City, since the Secretary of the Navy on May 5, 1943, wrote the City accepting on behalf of the United States this parcel and stating that the acceptance by the Secretary of the Navy was pursuant to authority vested in him by Act of Congress approved March 27, 1942.

The United States has since erected a Naval Armory on said .918-acre parcel, which has lately been used by the Navy Department as a Section Base; transferred to the United States Coast Guard. A copy of the map de-

---

[177]Cal. Stats. 1941, page 390; Appendix to Answer, page 326.

picting this parcel in relation to the breakwater and the former line of ordinary high tide, and also a photostatic copy of the letter from Secretary of the Navy Forrestal, accepting this grant on behalf of the United States, are set forth in the Appendix to the Answer.[178]

The three other grants or leases were of parcels adjoining this Naval Armory site. These three grants were for, respectively, an .89-acre parcel, a .78-acre parcel, and an .80-acre parcel, of former tide and submerged lands located in the Pacific Ocean and Santa Barbara Channel, since reclaimed by artificial means as a result of the construction of the Santa Barbara breakwater. Each of these three additional grants was made pursuant to request of the Navy Department. Each was presumably approved as to title by the Attorney General of the United States. Each was granted by written instrument executed by the City officials. Each was accepted by the Secretary of the Navy in a manner similar to the .918-acre parcel above mentioned.[179]

Counsel for plaintiff place these transactions in the "doubtful" column.[180]

Counsel for plaintiff contend that

> "The lands involved were formed by gradual accretions to the seashore west of Santa Barbara breakwater. Since they resulted from a gradual movement seaward of the 'tideland' strip the lands should probably be classified as tidelands, which are not involved

[178]Appendix to Answer, pages 326-331.
[179]Appendix to Answer, pages 331-336.
[180]Plaintiff's Brief, Appendix B, page 237.

> in this proceeding. However, they are here classified as 'doubtful' to cover possibility that some of the area may be filled land."[181]

Counsel for plaintiff err in their legal assumption that a gradual accretion formed against a breakwater would alter in any way the character of or title to lands below the line of ordinary high water mark. The law in California is established that gradual accretions formed against a breakwater or caused by the maintenance of a breakwater on the ocean shore do not change the character of the tide or submerged land thereby accreted, nor do they disturb the title to the underlying land which remains as formerly in the State or its municipal grantee.[182]

Counsel's citation of *County of St. Clair v. Lovingston*, 23 Wall. 46, 66-69[183] is not in point. The California courts have distinguished the *Lovingston* case in adopting the rule governing ownership of artificially accreted submerged lands where the upland owner claims them against the State or its successor.[184] This being the case, counsel's contention as to the artificially reclaimed tide and submerged lands involved in the Santa Barbara grants and leases is immediately found to be without any legal justi-

---

[181] Plaintiff's Brief, Appendix B, page 237.

[182] In *Carpenter v. City of Santa Monica* (1944), 63 Cal. App. (2d) 772, Santa Monica breakwater caused accretions, and the court held that the legal character did not change from tide and submerged lands nor was the status of title altered thereby, even though accretions were formed gradually and imperceptibly. *Los Angeles Athletic Club v. City of Santa Monica* (1944), 63 Cal. App. (2d) 795. See also *City of Los Angeles v. Anderson*, 206 Cal. 662; *Patton v. City of Los Angeles*, 169 Cal. 521; *Dana v. Jackson Street Wharf Company*, 31 Cal. 118.

[183] Plaintiff's Brief, page 167, Note 26.

[184] *Carpenter v. City of Santa Monica* (1944), 63 Cal. App. (2d) 772, 787.

fication. Hence, these four grants and leases are seen to consist of portions of tide and submerged lands, since reclaimed, lying within the Pacific Ocean and Santa Barbara Channel and outside of any bay or harbor. Counsel's classification of these in the "doubtful" category is, therefore, unwarranted, since, except for the fact that they are situated within the Santa Barbara Channel of the Pacific Ocean, they fall within the category of "open sea."

6. Grants From the Cities of San Diego, Oakland and San Francisco.

Many grants, leases, licenses and easements from the Cities of San Diego, Oakland and San Francisco to the United States are presented in the Appendix to the Answer.[185] Counsel for plaintiff are correct in stating that these grants and other instruments from these three cities to the United States are all of submerged lands, with some instances of tidelands located within San Diego Bay or San Francisco Bay.[186] The significance, however, of the grants and other instruments from these three cities lies in the fact that here again we find the treatment or recognition by the United States and its various branches, departments and agencies of the lands lying in bays and harbors the same as its treatment or recognition of lands lying in the marginal sea. This is simply another demonstration of the proposition that we sincerely believe to be fundamental that there is no difference in law or fact between, nor in the treatment accorded to the title to, submerged lands located under the marginal sea as contrasted with those under bays and harbors.

---

[185]Appendix to Answer, pages 337-440.

[186]Plaintiff's Brief, Appendix B, pages 237-243.

(IV)
Grants From Other Coastal States to the United States.

We propose to discuss as briefly as possible a few of the illustrative grants from some of the other coastal States to the United States, particularly those which are conceded by counsel for plaintiff to lie in the "open sea" or which they consider to be in the "doubtful" category as to whether or not they are in the open sea. We believe this will be helpful to the Court in reviewing the details of some of these examples of grants to the United States in the marginal sea in weighing this issue of acquiescence on the part of the United States.

1. Grant of State of Washington to United States in Marginal Sea.

The oceanward boundary of the State of Washington extends one marine league into the Pacific Ocean, and runs along a line parallel with the coast line

"keeping one marine league offshore."[187]

The State of Washington in its Constitution, approved by Congress, declared itself to be the owner of the beds and shores of all navigable waters within its boundaries.[188]

An act of the Washington Legislature, approved March 13, 1909, granted the United States submerged lands under the marginal sea as well as bays, harbors and rivers,

---

[187] Appendix to Answer, pages 541-52.
[188] Appendix to Answer, pages 542-543.

extending out to a depth of four fathoms of water at ordinary low tide around United States Military and other Reservations.[189]

The United States War Department a number of years ago claimed title and ownership of the tide and submerged lands extending out to a depth of four fathoms of water around Fort Canby Military Reservation under this Act of 1909. This Reservation is located on Cape Disappointment, being the extreme northern headland in the Pacific Ocean at the mouth of the Columbia River. A map showing the location of Cape Disappointment (also known as Cape Hancock), is set out in the Appendix to the Answer.[190]

A controversy arose between the military authorities at Fort Canby and an individual over the latter's right to fish in and upon the waters covering the submerged lands thus granted to the United States by said 1909 Act. The question was submitted to the Attorney General of the United States. On March 20, 1925, he rendered an opinion to the Secretary of War. (30 O. A. G. 428.) The Attorney General discussed the 1909 grant from the State, and said that:

> "*The United States,* upon acquiring territory by cession, treaty, or by discovery and settlement, *take the title and the dominion of lands below high-water mark of tide waters for the benefit of the whole people and in trust for the future States to be created out of the territory. Knight v. United States Land Association,* 142 U. S. 161. While the country so ac-

---

[189]Appendix to Answer, pages 543-544.

[190]Appendix to Answer, page 544.

> quired is held as a Territory, the United States have all the powers both of national and municipal government, and may grant, for appropriate purposes, titles or rights in the soil below high-water mark of the waters. But Congress has never undertaken by general laws to dispose of said lands. *Shively v. Bowlby, supra,* page 48 . . . *it is my opinion that title thereto passed to the State upon its admission to the Union.*" [101]

Counsel say as to this grant that:

> "Thus, the lands involved in this grant appear to be situated in the Pacific Ocean as well as in the Columbia River,"

and classify this grant as "Open sea."[102]

However, as to the opinions of the Attorney General above referred to, counsel claim that the Attorney General only considered the submerged lands adjoining Cape Disappointment lying *in* the Columbia River rather than *along the "open sea."*[103] It is apparent though, that the Attorney General did not *then* attempt to make any distinction between those submerged lands adjoining Cape Disappointment *on the ocean side* and those adjoining the Cape around the headland and passing into the entrance of the Columbia River. This illustrates the inherent fallacy in this newly discovered theory of the Attorney General. It shows that in 1925 his predecessor in office had no doubt that all lands under all navigable waters within the boundaries of the State belonged to that State. The present incumbent in that same office pre-

---

[101] Appendix to Answer, pages 545-547.
[102] Plaintiff's Brief, Appendix B, page 244.
[103] Plaintiff's Brief, Appendix B, page 244.

sents a radically altered position and advances a proposition calling for distinctions that would cut off the title of the State at some point around Cape Disappointment at its northern headland on the Pacific Ocean, which location counsel themselves are unable to ascertain.

2. Grants From Texas to the United States.

(a) Grant of Galveston South Jetty Area.

A *two mile strip extending into the Gulf of Mexico outside of any bay or harbor,* was deeded to the United States, at its request, by Texas on June 28, 1912. This involved a parcel of approximately 658 acres, of which a substantial portion consisted of submerged lands lying below low water mark in the marginal sea.

The patent executed by the Governor of Texas dated June 28, 1912 "granted" (contrary to the reference in Plaintiff's Brief, p. 174, to this as a "quitclaim patent"[194] to the United States the title of the State of Texas to the tide and submerged lands lying in front of the military reservation, consisting of a strip 100 feet wide extending a distance of approproximately *two miles from the line of ordinary high tide easterly into the Gulf of Mexico.*[195] This grant was the result of a report from a special board appointed by the War Department for improving and protecting Fort San Jacinto Military Reservation at the northeasterly tip of Galveston Island.[196]

---

[194]See discussion of whether or not a conveyance is a "quitclaim." in this Appendix, *supra*, pp. 190-191.

[195]Appendix to Answer, page 595.

[196]H. Doc. #1390, 62nd Cong., 3rd Sess., p. 6

A photostatic copy of the map prepared in 1912 by the War Department requesting this patent is set forth in the Brief, page 163.

Counsel for plaintiff classify this grant as being in the "open sea."[197]

Counsel for plaintiff devote two pages of their Brief to stating the background for this grant.[198] But nothing there said in explanation of this grant detracts in any respect from the conceded fact that this conveyed fee title to approximately 25 acres in the marginal sea extending a distance of two miles into the Gulf, granted at the specific request of the War Department.

(b) Mustang Island Grant.

In 1907 the Texas Legislature enacted a statute granting to the United States a parcel of 100 acres of land situated on and around Mustang Island bordering on the Gulf of Mexico and extending into the Gulf, for the purpose of constructing the south jetty at the entrance to the harbor of Arkansas Bay. The Act of the Legislature recited that:

> "Whereas the United States Government will not construct said jetty unless it owns and controls all land on which the jetty may be constructed, and also sufficient lands on said Mustang Island on which to locate engineers' offices and other buildings and for forts and barracks."

---

[197]Plaintiff's Brief, Appendix B, page 246.

[198]Plaintiff's Brief, page 174.

The Act made a "grant" (not "quitclaim") specifically describing the area as beginning at a point on the "Gulf shore", and thence by given courses

> "to low water line of the Gulf Shore to place of beginning, . . . *including all future accretions and accumulations and as a result* of nature, or *the construction of public works* for the improvement and defense of the harbor, . . . provided that the tidal lands in front of and all future accretions and accumulations as the result of nature, and resulting from the works for the improvement and defense of the said harbor or bays. . . ."

By including accretions and accumulations caused by or resulting from the construction of the jetty or other improvements, this grant necessarily conveyed to the United States *lands below low water mark in the marginal sea,* as such submerged lands existed in a state of nature prior to construction of the jetty and other improvements. As seen above,[199] gradual accumulations formed against breakwaters, piers or jetties on the coast do not alter the legal character of the underlying tide or submerged lands, nor do they affect the status of the title of the State or its grantee thereto.

From this its results that the 1907 grant from Texas to the United States, of the submerged lands covered by accumulations against the jetty and other improvements, involved submerged lands below low water mark in the "open sea" outside of any bay or harbor.

---

[199]Discussed in connection with City of Santa Barbara grants and leases, in this Appendix, p. 252.

The comment of counsel for plaintiff is an erroneous one. They say that this grant, by its description, extended only to the low water shore line and that "although the area is adjacent to the open waters of the Gulf of Mexico, the grant apparently did not extend seaward of the low water mark"; and classify this as "inland waters or tidelands."[200] Counsel err in failing to give effect to the language of the grant covering the lands in front of all future accumulations against the jetty and other works. We submit that this grant should properly be classified under plaintiff's column marked "Open Sea."

3. Mississippi Grant to the United States of Submerged Lands Surrounding Ship Island in the Gulf of Mexico.

The southerly boundary of Mississippi was fixed by an Act of Congress admitting the State into the Union, as well as in its State Constitution, as running "due south to the Gulf of Mexico, thence westerly, including all the Islands within six leagues of the shore, . . ." This oceanward boundary of Mississippi has been recognized by this court as including the marginal sea.[201]

In 1858, by Act of its Legislature, Mississippi made a grant and cession to the United States relating to Ship Island and to a strip of submerged lands 1760 yards wide entirely surrounding the Island, lying off the coast of Mississippi in the Gulf of Mexico. This Act specifically

---

[200] Plaintiff's Brief, Appendix B, page 246.

[201] Appendix to Answer, pages 611-612. *Louisiana v. Mississippi* (1902), 202 U. S. 1.

ceded to the United States jurisdiction not only of the entire Island, but also over a strip 1760 yards wide measured from low water mark oceanward around the entire Island. Immediately following the 1760 yard description, the Act proceeded with this language:

> "All right, title and claim which this State may have to said Ship Island, Coast of Mississippi, are hereby granted to the United States."

The statute was ambiguous as to whether or not title was granted to the United States to the 1760 yard strip of submerged lands around the Island; or merely that jurisdiction was ceded over that 1760 yard strip. Accordingly, in 1940 the Mississippi Legislature enacted a further statute clarifying its 1858 Act to make certain that title to the 1760 yard strip of submerged lands around Ship Island had passed or did thereby pass to the United States. This 1940 Act read in part as follows:

> ". . . Ship Island Military Reservation . . . which the State of Mississippi, by an act approved November 15, 1858, ceded all rights, titles and claims to the United States Government, was all of that land described as follows:
>
> "Ship Island in the Gulf of Mexico, Coast of Mississippi including all of said island above, and within low water mark, and over all contiguous shores, flats and waters, within 1760 yards from low-water mark."[202]

---

[202] Appendix to Answer, pages 612-613.

This grant was clearly of a large strip of the marginal or "open" sea.

Plaintiff's counsel tell us that while this Ship Island grant appears "to involve lands under the open sea" it in fact did not do so; that "this act was in effect no grant at all," since, counsel say, the 1858 Act was merely a cession of jurisdiction of a 1760 yard strip of submerged land, whereas the grant of title to Ship Island covered only the island itself; and that the State had no ownership in the Island which it could grant as the Island was already owned by the United States, having been public land reserved as a military reservation by Executive Order issued in 1847. Thus counsel attempt to explain the 1940 Act as an effort on the part of the Mississippi Legislature to define the area attempted to be transferred to the United States in 1858, but say that this was an ineffectual effort to increase the size of the Reservation so as to include contiguous submerged lands for the benefit of an American Legion Post to which the Military Reservation itself was conveyed pursuant to an Act of Congress of June 15, 1933. Counsel then refer to an opinion of May 27, 1940 rendered by the Judge Advocate General of the Army ruling that the 1940 Act of the Mississippi Legislature could not have the effect of so enlarging the Military Reservation as to require a conveyance from the United States to the American Legion Post of the contiguous submerged area under the last mentioned Act of Congress.[208]

---

[208]Plaintiff's Brief, pages 168-169, Footnote 28.

Counsel for plaintiff have overreached themselves in this strained explanation of the Mississippi grants of 1858 and 1940.

(i) One thing is perfectly clear: The Mississippi Legislature believed that it was granting title to the United States to 1760 yards of submerged lands in the marginal sea when it passed its 1940 Act.

(ii) The next thing that is found is that counsel for plaintiff have entirely missed the point of the Judge Advocate General's ruling of May 27, 1940 referred to by counsel. A careful examination of that opinion discloses that the Judge Advocate General there advised the Secretary of War against executing *an additional deed* to the American Legion Post conveying the 1760 yard strip of submerged land lying adjacent to and in front of the Military Reservation. The reason given in the opinion is enlightening: It is therein stated that the Military Reservation covered *only a part of Ship Island.* The entire upland of the island was originally a part of the public domain, reserved by the United States upon admission of Mississippi into the Union. In 1847, an Executive Order established the military reservation *on a portion of the island only.* In 1852, 50 acres at the western end of the island were set apart for lighthouse purposes; in 1927 an additional portion of the island was transferred as a part of the lighthouse reservation; and still another portion of the island was transferred to the Treasury Department as a quarantine station. The 1858 Act of the Mississippi Legislature described the 1760 yard strip of submerged lands ex-

tending around the *entire* island and adjoined a much greater area of upland than the Military Reservation thereon. In 1933 Congress passed an Act pursuant to which a deed was executed and delivered conveying the Military Reservation to the American Legion for an appraised value of $15,000. Another Act of Congress of 1935 reduced the cost to the American Legion, on a reappraisal, to $2150, which was accepted in full settlement of the purchase price due the United States from the American Legion. The opinion of the Judge Advocate General was simply that the 1940 grant of title from Mississippi to the United States of the 1760 yard strip of submerged lands around Ship Island did not entitle the American Legion to a second deed conveying the 1760 yard strip of submerged lands lying in front of and adjoining the former Military Reservation *for the same consideration and without a further Act of Congress.* The opinion of the Judge Advocate General *in no way questions the passage of title* from the State to the United States of the 1760 yard strip of submerged lands in the marginal sea surrounding Ship Island. A photostatic copy of the ruling of the Judge Advocate General, dated May 27, 1940, referred to in plaintiff's Brief, is deposited herewith with the Clerk of the Court.

Thus it appears plain that counsel for plaintiff have erred in their treatment of this Ship Island grant. They have failed to classify this grant as involving lands underlying the "open sea," and in this, we submit, they are clearly wrong.

4. Grants From Florida to the United States.

Florida's oceanward boundary, as defined in its 1868 Constitution, and as approved by Act of Congress, extends into the ocean "three leagues from the land." This boundary has been recognized by this Court.[204]

Florida has made several grants of these lands in the marginal sea to the United States:

(a) St. John's River Jetty, Extending About Two Miles Into the Atlantic Ocean.

Florida granted to the United States a tract of approximately 450 acres of submerged lands *extending about two miles into the Atlantic Ocean* at the mouth of the St. John's River by deed dated December 27, 1938. This grant was required by the United States for the maintenance of a jetty at the mouth of the St. John's River.[205] A map showing the location and dimensions of this 450 acres of submerged lands in the marginal sea is set forth in the Brief, page 164.

This deed was executed pursuant to an Act of the Florida Legislature and reserved to the State ¾ undivided interest in and to all phosphate, minerals and metals in or under the granted lands, and an undivided ½ interest in and to all petroleum in or under the granted lands.

Counsel for plaintiff concede that this grant was of a "fee simple title; that this area "extended into the ocean" and classify the grant as in the "open sea."[206]

---

[204] *The Abby Dodge*, 223 U. S. 166; Appendix to Answer, pages 627-628.

[205] Appendix to Answer, page 633.

[206] Plaintiff's Brief, page 175; Appendix B, page 248.

Counsel asserts that

> "The background of this transaction reveals that it constitutes no part of any established policy in regard to the ownership of land under the open sea"

and add that the deed was accepted

> "as a solution to a problem arising by virtue of the circumstances in this peculiar case."[207]

Counsel then point out that the north jetty at the mouth of the St. Johns River was constructed in the period of 1880 to 1904 and was anchored to and partially located upon an island at the mouth of the River; that a portion of the jetty extends landward from high water mark and that the portion extending seaward from high water mark runs a distance of approximately 7,250 feet; that several years before 1929 private interests owning adjacent lands constructed a highway along the north bank of the St. Johns River to the inner end of the jetty, causing considerable accretion on the north side of the jetty; that numerous efforts by private interests were made to locate upon and claim these accreted lands; that in order to avoid this situation, the United States felt title should be acquired to the adjacent tracts on each side of the jetty so that as the accretions moved seaward, the title to the newly formed area adjacent to the jetty would be in the United States; and that the State authorities were in accord with the plan by which the State would convey an area on each side of the jetty with the instrument being

---

[207] Plaintiff's Brief, pages 175-177.

recorded in the local County records. Counsel then conclude their narration of this transaction by saying that:

> "Accordingly, on February 26, 1929, a quitclaim deed was executed by the Trustees of the Internal Improvement Fund of the State of Florida. On December 28, 1938, there was substituted for this quitclaim deed the purported fee simple deed referred to by the State of California (App. 631). The descriptions in the two instruments are identical."[208]

In another place in the Brief, counsel seek to explain this grant by saying that:

> ". . . there were involved such unique problems as the presence of squatters on the accreted land adjacent to the north jetty at the mouth of the St. Johns River,"[209]

and assert that it was

> "cons ucted almost simultaneously [with the north jetty] referred to by the State and extended equal distances into the marginal sea. . . . It does not appear that officers of the United States have ever accepted any grants or cessions of the lands on which these adjacent jetties are situated. . . ."[210]

Although we do not see how anything counsel have said concerning this grant detracts in the slightest from its effect as a complete recognition of Florida's ownership of the marginal sea, we would like to correct some of the inaccurate impressions that are given to the reader of counsel's narration of this transaction.

---

[208]Plaintiff's Brief, pages 176-177.

[209]Plaintiff's Brief, page 180.

[210]Plaintiff's Brief, page 181, note 37.

The fact is that on February 26, 1929, two deeds were executed by the State of Florida granting to the United States two tracts of submerged lands. One tract was on the south side of the entrance channel to the St. Johns River and was known as the Ward's Bank Retaining Wall. The second parcel was on the north side of the channel on and extending from Little St. George or Xalvia Island.

Counsel for plaintiff assert that the 1929 deeds were mere "quitclaims." To the contrary, these deeds were grant deeds in fee simple. The granting clause thereof provides that the State of Florida

"does grant, bargain, remise, release and quitclaim" to the United States, its successors and assigns, the described parcel containing 449.5 acres as shown on an attached map

> "together with all riparian rights, tenements, hereditaments and appurtenances thereunto belonging and in any wise appertaining.
>
> "To have and to hold the said property unto the said party of the second part, its successors and assigns, for the purpose of navigation and for such other purposes as may be necessary or incident to navigation.
>
> "It is hereby understood and agreed between the parties hereto that in the event that the said piece, parcel, tract or area as above described shall cease to be used for such navigation purposes * * * *title to the said property above described immediately will revert to said party of the first part* and its successors and assigns."

There is obviously nothing of a "quitclaim" nature in the foregoing deed. *The provision for reverter of title upon nonuser of the premises for navigation purposes dispels any such notion.*

After the execution of these two deeds in 1929, it was found in connection with litigation concerning the parcel of land on the south side of the channel that the lands had not been advertised before the two deeds were executed in 1929, as required by the Florida statutes. As a result, in 1935, the War Department made written request of the State that two new deeds be executed pursuant to legal notices in compliance with the Florida statute. Accordingly, notices of intended sale were published in compliance with the statute and a new deed from the State to the United States covering the tract on the south side of the channel, known as Ward's Bank Retaining Wall, was executed and delivered under date of October 25, 1935. There was some delay in the execution of the second deed for the area on the north side of the channel on and adjoining Little St. George or Xalvia Island. A letter request was made by the War Department to the State under date of October 12, 1938, reviewing the entire matter and requesting that the deed to the tract on the north side be executed pursuant to proper publication of notice of the intended sale. Accordingly, notice was published of the intended sale of this second tract, and a deed dated December 28, 1938, was executed and delivered by the State to the United States covering the 450-acre parcel extending approximately two and one-half miles into the "open sea" on and under the north jetty. The 1935 and 1938 deeds were each *grants*

in *fee simple*. They each provided that the State of Florida

> "have granted, bargained, sold and conveyed to the said United States of America"

the described lands

> "To have and to hold the said above mentioned and described land and premises, and all the title and interest"

of the State of Florida

> "Saving and Reserving unto the Trustees of the Internal Improvement Fund of Florida. . . . an undivided three-fourths interest in . . . . all the phosphate, minerals and metal that are or may be in, on or under the said above described lands . . ."

A photostat copy of a letter from the War Department to the Trustees of the Internal Improvement Fund, dated October 12, 1938, is deposited concurrently herewith with the Clerk of the Court for inspection by the Court.

It will immediately be seen that counsel for plaintiff have misstated the facts concerning this transaction. Deeds were executed for both the north and the south jetties at the specific instance and request of the War Department. The 1935 and 1938 deeds were the result of doubts on the part of the United States that the deeds which had theretofore been delivered in 1929 fully complied with the requirements of the Florida statutes, and grant deeds conveying full fee simple title were accordingly again delivered.

As to the title to accretions artificially formed against the jetty remaining in the State—see the discussion relative to the Santa Babara grants and leases in this Appendix, p. 252.

It is hard to see how the background referred to by counsel avoids the inevitable conclusion that this was another in a series of transactions presented to the Court in which the United States requested and accepted grants from the State of submerged lands lying in the open sea.

(b) Crystal River Spoil Area Permit.

In 1939 the War Department requested that Florida grant a permit to the United States to deposit material obtained from dredging the entrance channel to Crystal River in the Gulf of Mexico. Accompanying this request was a map prepared by the War Department depicting the area as *extending approximately two miles into the Gulf of Mexico*. A photostat of a portion of this War Department map is set forth in the Brief, page 164.

The State thereupon granted written permission to the United States to deposit dredged materials in this "spoil area" extending into the Gulf of Mexico approximately two miles.[211]

Plaintiff's counsel concede that this spoil area permit at the mouth of Crystal River involved submerged lands partly "in the open sea" and "in the Gulf of Mexico", and classify the transaction as being in the "open sea."[212]

Plaintiff's counsel argue that this permit did not transfer title to the United States; that the United States could have conducted the dredging operations and deposited the dredged materials in navigable waters without obtaining State permission and regardless of the condition of the title to the underlying lands; and hence, counsel say

---

[211]Appendix to Answer, page 641.

[212]Plaintiff's Brief, page 174; Appendix B, page 248.

"it is not clear why such a permit was accepted by the War Department and its significance is doubtful at best."[218]

However, it is unimportant what the United States could or might have done. The controlling factor is that the War Department requested a permit from the State, as owner of the submerged lands extending about two miles into the Gulf of Mexico, prepared a map depicting these areas, accepted the permit from the State, and proceeded to make full use of the permit thus obtained.

5. Grants From South Carolina to the United States.

South Carolina has made a number of grants to the United States over the years of submerged lands lying in the marginal sea of the Atlantic Ocean.

(a) Outside Entrance to Winyah Bay.

In 1889 the South Carolina Legislature made a grant to the United States of submerged lands lying in the Atlantic Ocean outside the entrance to Winyah Bay extending 500 feet into the marginal sea beyond the line of high water mark. This was made for the purpose of constructing jetties thereon. This grant was in part in the following language:

> "There is hereby ceded to the United States of America, * * * any and all rights of the State to the adjacent water-covered territory extending from high-water mark . . . outward 500 (five hundred) feet, and also from the jetties to be constructed by the United States outward about five hundred feet in every direction into the Atlantic Ocean . . .

---

[218]Plaintiff's Brief, page 175.

and all accretions to said territory growing out of the construction of said jetties, or from any other causes; . . ."[214]

Counsel for plaintiff concede this transaction extended "into the ocean" and classify it as being in the "open sea."

However, counsel say that this grant was "quitclaim in nature, purporting to convey only whatever interest" South Carolina had in these submerged lands.[215]

We submit, however, that the language of the South Carolina statute above quoted does not bear out the construction placed upon it by plaintiff's counsel with respect to its being "quitclaim" in nature. The exact language used in the statute is that "there is hereby ceded . . ." It seems obvious that it was treated as a grant of the fee simple title and is not to be minimized on the ground suggested by counsel.[216]

(b) Grant of Submerged Lands Around Fort Moultrie Military Reservation.

In 1896 the South Carolina Legislature passed a statute granting to the United States portions of the submerged lands in front of Fort Moultrie Military Reservation located on Sullivan's Island, which is the northern headland at the entrance of Charleston Harbor. This grant extended a distance of 100 yards into the Atlantic Ocean

---

[214]Appendix to Answer, pages 653, 654.

[215]Plaintiff's Brief, page 172; Appendix B, page 249.

[216]See discussion of whether or not a conveyance is a "quitclaim," in this Appendix, pp. 190-191.

below low water mark and consisted of three separate parcels. This grant reads in part as follows:

> "the right, title and interest of this State to, and the jurisdiction and control of this State over, the following described . . . lands covered by water, . . . are hereby *granted* and ceded to the United States of America . . . bounded as follows [then follows the legal description] to a point in the sea *100 yards below high water line; . . .*"

Plaintiff's counsel concede that this transaction involved submerged lands in the marginal sea and classify it as being in the "open sea."[217]

Counsel's description of this as "quitclaim in nature"[218] is unjustified, since the language of the statute is that the submerged lands are "hereby granted and ceded to the United States of America." The word "quitclaim" is not found in the statute.[219]

(c) Grant of Submerged Lands in Front of the Town of Moultrieville.

In 1900 the South Carolina Legislature made a grant to the United States of submerged lands in the Ocean in front of the Town of Moultrieville on Sullivan's Island, which, as above mentioned, is the northern headland at the entrance to Charleston Harbor. This grant provided in part as follows:

> ". . . the right, title and interest of this State to, and the jurisdiction of this State over, the fol-

---

[217]Plaintiff's Brief, page 172; Appendix B, page 249.

[218]See discussion of question whether or not a conveyance is a "quitclaim," in this Appendix, pp. 190-191.

[219]Plaintiff's Brief, page 172; Appendix B, page 249.

> lowing described tracts or parcels of land, and land covered with water . . . are hereby *granted* and ceded to the United States of America as sites for the location, construction and prosecution of works, fortifications and coast defense. . . . All that tract and parcel of land, *and land covered with water* bounded as follows [then follows the legal description] *100 yards below high water line; . . .*"

Plaintiff's counsel concede this also to be located in the "open sea." Their description of this grant as a "quitclaim"[220] is unwarranted, since, as will be seen, the granting words of the statute are "hereby *granted* and ceded to the United States of America."

(d) Second Grant of Submerged Lands Adjoining Fort Moultrie Military Reservation.

When the United States acquired additional lands as a part of the Fort Moultrie Military Reservation on Sullivan's Island, the Legislature of South Carolina, in 1913, passed a statute granting to the United States additional submerged lands lying along and extending 100 yards into the Atlantic Ocean in front of the new addition to the military reservation.[221]

Plaintiff's counsel concede this transaction to be in the "open sea." Their further description of it as being "quitclaim in nature"[222] is unjustified in view of the granting words of the statute.

---

[220]Plaintiff's Brief, page 172; Appendix B, page 249.
[221]Appendix to Answer, page 656.
[222]Plaintiff's Brief, page 172; Appendix B, page 249.

(e) THIRD GRANT OF SUBMERGED LANDS IN MARGINAL SEA ADJOINING FORT MOULTRIE MILITARY RESERVATION.

Four additional grants of lands under water adjoining Fort Moultrie Military Reservation on Sullivan's Island at the entrance to Charleston Harbor were made by the South Carolina Legislature in the years 1905, 1906, 1908 and 1916.[223] The fourth of these grants extended 100 yards beyond low water mark into the marginal sea outside of the bay or harbor. Plaintiff's counsel classify this fourth grant as lying in the "open sea."[224]

6. Delaware Grants of Submerged Lands to the United States.

Delaware has made several grants to the United States of its submerged lands.

Three of these grants were made by Acts of the Delaware Legislature in the years 1871, 1873 and 1889, involving submerged lands extending oceanward from low water mark distances of 1,000 feet, 3,000 feet, and 1,200 feet, respectively, adjoining Cape Henlopen, which is the southerly outer headland at the entrance of Delaware Bay. These were outright grants and not quitclaims. They were made in connection with the construction of the breakwater at the harbor entrance.

It is true that these granted submerged lands adjoin Cape Henlopen on the westerly and northwesterly side of the headland. For that reason, these grants may lie just inside of a line drawn from that headland to Cape May,

---

[223]Appendix to Answer, page 657.

[224]Plaintiff's Brief, page 172; Appendix B, page 249.

the northeasterly headland on the Atlantic Ocean at the entrance of Delaware Bay. Counsel for plaintiff classify these three grants as involving "inland waters."[225]

However, as these three grants of submerged lands are so close to the dividing line between Delaware Bay and the Atlantic Ocean, each one of them is worthy of full consideration by the Court in reviewing the over-all problem of acquiescence on the part of the United States; and also the basic issue in the case as to whether there is any legal distinction, for title purposes, between a "true bay" and the marginal sea, particularly when borderline cases, such as these three grants, are involved.

7. Grants from Rhode Island to the United States of Submerged Lands in the Marginal Sea.

Rhode Island's oceanward boundary is fixed by a statute of 1872 as extending one marine league from shore at high water mark.[226]

Rhode Island has made a number of grants to the United States of submerged lands, some lying in the marginal sea.

(a) Grant at the Mouth of Seaconnet River.

The Rhode Island Legislature in 1883 made a grant to the United States of both ownership and jurisdiction of submerged lands lying within a circle 700 feet in diameter the center of which is a named rock situated in the Atlan-

---

[225]Plaintiff's Brief, Appendix B, pages 251, 252.
[226]Appendix to Answer, page 703.

tic Ocean at the mouth of the Seaconnet River. The grant was for the purpose of erecting and maintaining a lighthouse thereon. The language of the statute is that:

> "There is hereby granted to the United States ownership and jurisdiction over a circle 700 feet in diameter. . . ."

The Attorney General of the United States rendered his written opinion on March 31, 1883 approving the title of the State of Rhode Island to the submerged lands lying within this 700 foot circle at the mouth of the Seaconnet River.[227]

Plaintiff concedes that the rock which is the center of this 700 foot circle of submerged lands is in such proximity to the Atlantic Ocean at the mouth of the river that plaintiff is in doubt as to whether a portion of the submerged lands extend beyond the headlands of the river and is thus in the Atlantic Ocean or marginal sea; and accordingly plaintiff classifies this transaction as being in the "doubtful" category.[228]

(b) Grants Around Block Island.

In 1919, by two separate Acts of the Rhode Island Legislature two parcels of submerged lands were granted to the United States, both of these grants being situated in the Atlantic Ocean at the entrance of Great Salt Pond Harbor. One was a circular area 200 feet in diameter around a lighthouse site at the entrance of this bay in the Atlantic Ocean. The other was a 7.21 acre parcel of submerged land adjoining the breakwater in the Atlantic

---

[227] Appendix to Answer, page 705.

[228] Plaintiff's Brief, Appendix B, page 253.

Ocean at the entrance of this harbor. A study of U. S. C. & G. S. Charts Nos. 1211 and 276 shows that the 7.21 acre parcel adjoining the breakwater lies outside the entrance to Great Salt Pond Harbor, and therefore, is *wholly in the marginal sea.* Hence, one of these two grants from Rhode Island is wholly outside the harbor and is in the marginal sea.[229]

Counsel for plaintiff says that

> ". . . it is not clear just where these lands are located. At least part of the area is probably located within the harbor, but it is not clear whether any of it is outside the entrance to the harbor;"

and counsel proceeds to classify these two grants as being in the "doubtful" category.[230]

Counsel are in error here, for, as pointed out above, the 7.21 acre parcel is located entirely outside the entrance to the harbor, and hence the grant of submerged lands around it involved the open Atlantic Ocean and the marginal sea.

8. Grant by Massachusetts of Minot's Rock.

In 1847, the Massachusetts Legislature passed a statute granting to the United States the submerged lands on and around Minot's Rock or Ledge.[231]

Plaintiff's counsel place this transaction in the "doubtful" category, and state that this submerged land is in Massachusetts Bay and observe that:

> "However, it is not clear whether this bay is to be regarded as inland waters (as a 'historic bay') or whether it is to be treated as open sea."[232]

---

[229]Appendix to Answer, page 706.

[230]Plaintiff's Brief, Appendix B, page 254.

[231]Appendix to Answer, page 708.

[232]Plaintiff's Brief, Appendix B, page 254.

It is a curious thing that counsel for plaintiff are troubled with a specific application to Minot's Rock of their own incongruous theory. If Massachusetts Bay is to be deemed a "true bay" or a "historic bay" for the purposes of plaintiff's theory, it is so despite the fact that the headlands from Cape Cod to Cape Ann are *over forty miles distant from each other*. In view of plaintiff's own definition of a bay as involving headlands not more than ten miles apart, many questions arise. In view of the further fact that the Massachusetts Legislature in 1859 defined a bay or arm of the sea as one not exceeding two marine leagues in width between headlands,[233] it is difficult to follow plaintiff's doubt with respect to the Minot's Rock grant as being in the "open sea."

9. Numerous Other Grants From Coastal States to the United States.

There have been a multitude of other grants from the coastal States and the Great Lakes States to the United States of submerged lands in the marginal sea and in bays, harbors, rivers and lakes. Many examples, not discussed in detail above, of such coastal State grants are set out in the Appendix to Answer.[234] Most of these last mentioned examples involve submerged lands in bays, harbors and the Great Lakes. But their significance in this case is to show the uniformity of treatment by the United States and by all coastal States of the States' ownership of submerged lands wherever located within the exterior boundaries of the States.

---

[233] Appendix to Answer, page 708.

[234] Appendix to Answer, pages 541-739.

(V)

Judicial, Congressional and Departmental Rulings and Acts Recognizing States' Ownership of Submerged Lands.

The Judicial and Legislative branches and the various departments of the Executive branch of the United States, have for decades ruled, decided and declared that the States are the owners of and hold the title to all tide and submerged lands within the boundaries of the respective States (subject to grants to and condemnations by the United States of portions thereof). A few illustrations of these acts, rulings and declarations will be referred to in further support of defendant's contention that there has been a long-continued practice on the part of the United States recognizing and acquiescing in such State ownership.

(A) By the Judiciary.

The declarations of the rule by the Court are set forth in the Brief under "Rule of Property," pp. 120-126.

Counsel for plaintiff comment on these court decisions and declarations by merely pointing out that three of them (*Bankline Oil Company v. Commissioner* and the two *Spalding v. United States cases*) involved income tax liability on moneys received from production of oil from offshore submerged lands; that another (*Boone v. Kingsbury*) was the California Supreme Court's decision in which certiorari was denied and an appeal dismissed by

this Court, and in which the United States was not a party; and that the eight decisions of this Court relating to California,[235] each involved so-called inland waters. Counsel then conclude that these decisions

> "obviously constitute no basis for the State's contention in regard to recognition of ownership of lands under the open sea."[236]

This cavalier treatment of the declarations of a rule of property law by the many eminent members of this Court, and of the lower Federal courts, over a period of 105 years, repeated time after time, is unworthy of serious consideration. Obviously, these continued declarations, cumulated one upon another, by the most eminent jurists this country has produced, are entitled to the utmost reliance by the State and its people and bear heavily on this issue of acquiescence by the United States.

(B) By the Legislative Branch.

The policy of Congress, established over 100 years ago and consistently followed ever since, that the original States own their submerged lands both in the marginal sea and in bays, harbors, navigable rivers and lakes, and that submerged lands in territories are held in trust for the new State which acquire title thereto by virtue of sovereignty, is heretofore dealt with (*supra*, pp. 149-168).

---

[235] Appendix to Answer pp. 73-78.
[236] Plaintiff's Brief, pp. 183-185.

(C) By United States Attorney General.

The Attorney General of the United States has been required for generations by various Acts of Congress to render his opinion on the title to all lands acquired or received by the United States.[247]

Presumably, therefore, the Attorney General has rendered a favorable opinion that title was vested in the State or its grantee in every instance in which the United States has taken an instrument conveying title or rights in submerged lands either in the marginal sea or in bays or harbors. While we have not located every one of these opinions, we have presented a good number of them in the Appendix to the Answer. Mention of a few of them will make it clear that the Court is entitled to indulge in the presumption that the Attorney General has obeyed the Act of Congress in every instance and that there is a favorable title opinion for every grant.

We have heretofore discussed

(i) the 1927 opinion of Attorney General Mitchell advising that title to submerged lands in the Pacific Ocean and Bay of San Pedro were vested in the City of Los Angeles as successor to the State of California (*supra*, pp. 187-188).

---

[247]By Act of Congress of September 11, 1851 (5 Stats. 468), now embodied in Revised Statutes, Section 355, and in 34 U. S. C. A., Section 520, as amended by Act of June 28, 1930, and by Act of October 9, 1940, also embodied in 40 U. S. C. A., Section 255, and 50 U. S. C. A., Section 175. Appendix to Answer, p. 452.

Regulations issued by the Department of Justice and the United States Attorney General "For The Preparation Of Title Evidence In Land Acquisitions By The United States" directing the procedure of the Attorneys of the Department of Justice in reviewing land title acquisitions by the United States, Section 1. Appendix to Answer, p. 453.

(ii) the 1915 opinion of the Attorney General's Office that the City of Los Angeles owned the submerged lands in the Bay of San Pedro (*supra,* pp. 188-189).

(iii) the 1934 opinion of the United States Attorney General's Office that title to the submerged lands in the marginal sea outside the Newport Bay Harbor entrance, granted to the United States by warranty deed, was vested in that City as grantee of the State (*supra,* pp. 214-215).

(iv) the opinion of the United States Attorney General accompanying the 1934 grant of submerged lands in the open sea adjoining North Island, California, advising that title was vested in the State (*supra,* pp. 196-198; 200-201).

(v) the opinions of the United States Attorney General rendered in 1925 in connection with the grant of submerged lands by the State of Washington to the United States adjacent to Fort Canby (*supra,* pp. 255-257); and

(vi) the opinion of the Attorney General accompanying the grant of submerged lands for a lighthouse site in the Atlantic Ocean at the mouth of Seaconnet River, Rhode Island (*supra,* p. 278).

Attention is called to the opinion of the Attorney General's Office dated Feb. 28, 1902 advising the War Department that title to all accretions formed against the East Jetty breakwater on tide and submerged lands in the Pacific Ocean and Bay of San Pedro belonged to the State of California and not to the United States.[248]

Presumably, there were Attorney General's opinions in connection with the grants for the submerged lands in the marginal sea outside the entrance to Galveston Harbor

---

[248]Appendix to Answer, pages 233, 234.

(*supra*, p. 257); for the submerged lands extending into the marginal sea of the Atlantic for the St. John's River Jetty (*supra*, p. 265); for the grant extending two miles into the Gulf of Mexico at the entrance of Crystal River (*supra*, p. 271); and for the four grants extending into the marginal sea of the Atlantic made by South Carolina outside the entrance to Winyah Bay and to Charleston Harbor (*supra*, p. 272).

Indeed, counsel for plaintiff not only ask this Court to overrule an established rule of property, but in filing this action, without specific direction from Congress have found it necessary to reverse and overrule their own opinions rendered over the decades on this very rule of property.

(D) By the Secretary and Department of the Interior.

A few of these many rulings of the Secretary or Department will be mentioned:

1. On January 3, 1900, the Secretary affirmed the decision of the Commissioner of the General Land Office rejecting the claim of J. W. Logan for a placer mining location of lands lying between high and low water marks and *also lying below low water mark extending into the marginal sea* of the Bering Sea off the coast of Alaska. The stated object of Logan's application was *"to work the ground under the water."* In an opinion prepared by the then Assistant Attorney General (later Associate Justice) Willis Van Devanter, the case of *Shively v.*

Bowlby, 152 U. S. 1, 58, was quoted from at length, including the statement that:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States *in the tide waters, and in the lands under them, within their respective jurisdictions* . . . . The United States, while they hold the country as a Territory, . . . have acted upon the *policy* . . . of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil *under them* to the control of the States, respectively, when organized and admitted into the Union."

The opinion then quotes from the Act of Congress of May 14, 1898, discussed above (p. 149), declaring that the United States holds in trust, for the people of any State or States thereafter erected out of the District of Alaska, title to the beds of all navigable waters within that District. The opinion then states that:

> "This legislative declaration is in entire harmony with the law as it had been previously announced by the Supreme Court (in Shively v. Bowlby) and is indicative of a purpose on the part of the Congress, in dealing with the District of Alaska, to adhere to the *policy* theretofore existing with respect to the tide lands."[250]

---

[250] *James W. Logan* (Jan. 3, 1900), 29 L. D. 395. Appendix to Answer, pages 531-535. Logan's letter-application to the Secretary of the Interior dated November 27, 1899, referred to his claim as covering *"330 feet of tidewater*, our object being *to work the ground under the water* . . . The sand *under the sea* is also quite rich, but how far from the main tideland it is impossible for me to say." While the transmittal letter from the Commis-

2. In 1910 the Commissioner of the General Land Office rejected an application of the State of Florida under an Act of Congress granting swamplands. The area covered tide *and submerged lands* east of the key on which the city of Key West, Florida, is situated on the edge of the Florida Straits. In his letter of rejection dated April 20, 1910, the Commissioner of the General Land Office stated in part that:

> "Again, if the key or keys were formed subsequent to March 3, 1845, the date the State was admitted into the Union, and are within its borders, *title thereto would appear to be in the State by its right of sovereignty.*"

---

sioner of the General Land Office to the Secretary dated December 12, 1899, explaining the Logan application, uses the word "tide lands," and while this same word is used in the opinion of the Secretary, *supra,* it is clear from the other portions of the Secretary's opinion and especially from Logan's letter-application that he was seeking a mining location extending *below low-water mark* in the marginal sea as well as above the line of low-water mark; and that the opinion of the Secretary in using the term "tide lands" used it in its broadest sense, as many other courts have done, to refer to all lands below high-water mark, including lands extending beyond low-water mark into the sea.

Six months after rendition of this opinion, Congress passed the Act of June 6, 1900 (31 Stats. 321), by Section 26 of which it authorized mining locations in the District of Alaska to be extended over land and shoal water between low and mean high tide on the shores of the Bering Sea, subject to limitations necessary to protect navigation; but providing that no exclusive permit shall be granted to anyone to mine under these waters below low tide, except that persons who had theretofore legally declared their intention shall have the right to mine for gold or other precious metals in these waters below low tide, subject to rules and regulations of the Secretary of War for the protection of commerce and subject to certain other restrictions and exempting to that extent the application of the Act of Congress of May 14, 1898, hereinabove discussed. (2 *Lindley on Mines* (3rd Ed., 1914), page 1017; 3 *Lindley on Mines* (3rd Ed., 1914), page 2401. See *Alaska Gold Recovery Company v. Northern Mining and Trading Company* (D. C. Alaska, 1926), 7 Alaska Reports 386, 395. See 1 *Hackworth "Digest of International Law"* (1940), pages 654, 655.

The map of the area of tide and submerged lands referred to in the foregoing ruling of the Commissioner is set forth in the Appendix to the Answer.[251]

Counsel for plaintiff concede that a portion of the area involved in the foregoing ruling of the Commissioner "may be situated in the open sea."[252]

3. On September 15, 1926, the Secretary of the Interior through his First Assistant Secretary Finney rendered a letter-ruling and opinion rejecting an application of A. B. Bouton who requested a Federal permit to prospect for oil and gas in the Pacific Ocean off the coast of California. The Secretary there ruled that the land laws of the United States made no provision for the disposal of such lands and stated that:

> "California, upon admission to the Union, became vested of all the land below the line of ordinary high tide extending seaward coextensive with its municipal dominion, that is, in land-locked bays from headland to headland, and from the line of ordinary high tide from the shore of the open ocean seaward *a distance of three miles, or a marine league.* (85 Cal., 448) and (153 U. S. 273) . . .
>
> "An inquiry to the state Surveyor General, Sacramento, California will give you information as to whether or not the State disposes of its tidal lands."[253]

---

[251] Appendix to Answer, pages 637-638.

[252] Plaintiff's Brief, page 194.

[253] Appendix to Answer, page 461. Correspondence in files of General Land Office between A. B. Bouton and the Assistant Secretary dated September 3, 1926, and the Assistant Secretary's reply to Bouton dated September 15, 1926.

4. In 1933, Secretary of the Interior Harold L. Ickes issued a written opinion and ruling rejecting an application of Olin S. Proctor for a Federal oil and gas lease in the Pacific Ocean off the California coast, and after quoting from *Hardin v. Jordan,* 140 U. S. 371, stated that:

> *"The foregoing is a statement of the settled law* and therefore no rights can be granted to you either under the leasing act of February 25, 1920 (41 Stat. 437), or under any other public-land law *to the bed of the Pacific Ocean either within or without the 3-mile limit. Title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State . . ."*[254]

5. In 1934 the Commissioner of the General Land Office rendered an opinion rejecting the applications of Cunningham, Rose, Mayhew and Vermilyea seeking Federal oil and gas permits or leases covering 1920, 300, 1600 and 364 acres, respectively, of submerged lands lying in the Pacific Ocean off the City of Huntington Beach. The Commissioner there stated in part that:

> ". . . the land applied for in this application is either within the exterior boundaries of the confirmed Las Bolsas land grant, title to which has passed to the Government, *or in the Pacific Ocean.* If it is below the line of ordinary high tide, jurisdiction thereover is in the State of California, *as upon its admission into the Union it became, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal domain extends,* subject to the public right of navigation."

---

[254]Appendix to Answer, pages 461-463.

Appeals were taken by these four applicants to the Secretary of the Interior who, on October 4, 1934, rendered his formal decision and opinion confirming the Commissioner's rejection of these applications. (55 I. D. 1.)

On motion of Cunningham, *et al*, for rehearing, the Secretary, on November 28, 1934, affirmed his decision of October 4, 1934. Thereafter, Cunningham moved the Secretary to exercise his supervisory authority and grant oral argument. In denying this motion, the Secretary, on February 7, 1935, affirmed his prior action and stated that:

> "It is not questioned that the land lies below the level of ordinary high tide of the Pacific Ocean.
>
> "The application was rejected under a rule of law long ago announced by the Supreme Court of the United States and uniformly applied in subsequent decisions up to recent times, and quoted in the decisions of October 4, 1934, as follows:
>
> > *'Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, . . .'*
>
> *"The Department, therefore, has no jurisdiction over the subject matter.* This rule is regarded as decisive and binding on the Department. Examination of the motion discloses that it *presents nothing new,*

but under some changes in phraseology its contentions are the same that were fully considered when the decisions in the case were prepared. As stated in the motion for rehearing, *'In substance, petitioner suggests that we disregard these decisions. We are not at liberty to do so.'* This is a sufficient and conclusive answer to the matters set up in the motion. No useful purpose would be served by the grant of an oral hearing.

"The motion is without merit and is, therefore, denied."[255]

6. On January 13, 1937, the Assistant Secretary of the Interior rendered a formal reported opinion denying twelve applications for Federal oil and gas leases covering thousands of acres lying in the Pacific Ocean in Santa Barbara County, or in front of the City of Huntington Beach, or in the Bay of Santa Monica. The Assistant Secretary, after quoting at length from *Borax Consolidated v. Los Angeles,* 296 U. S. 10, concluded by saying that:

"Title to the lands involved passed to the State of California in 1850."[256]

7. From 1934 to 1936 approximately fifty-two additional applications for Federal oil and gas leases were filed by individuals describing areas ranging from 250 acres to 2560 acres each of submerged lands lying in the

---

[255]Appendix to Answer, pages 463-469.

[256]56 I. D. 60, 62; Appendix to Answer, pages 495-498.

marginal sea of California.[257] The Secretary and Department of Interior rendered approximately *twenty-six separate written opinions finally rejecting each of these fifty-two applications.* In practically every one of these opinions there is a specific ruling that the State of California is the owner of the submerged lands lying in the Pacific Ocean and repeated citations and quotations were made from the decisions of this Court announcing that rule.[258]

8. Sometime in 1937, the Secretary of the Interior commenced to hold in abeyance all further applications for Federal oil and gas leases covering submerged lands in the marginal sea of California. See *Dunn v. Ickes* (App. D. C., 1940), 115 F. (2d) 36. Approximately two hundred applications for Federal oil and gas leases have been filed with the Department of the Interior covering submerged lands in the marginal sea of California which have been pending since 1937 or later.

The comments of counsel for plaintiff concerning the many rulings of the Secretary and Department of the Interior that California and the other coastal States, respectively, own the submerged lands within their adjoining marginal seas will now be taken up.

(a) Counsel concede that these rulings "reflect a belief of that Department that title to the lands was in the State."[260]

---

[257]Appendix to Answer, pages 469-500.

[258]Appendix to Answer, pages 469-500.

[260]Plaintiff's Brief, page 197.

(b) Counsel repeat the statement that the rulings of the Secretary and Department that California owned the title to the submerged lands was only "during the period from 1933 to 1937."[261] Counsel state and repeat that "these declarations [by the Secretary and Department] were confined largely to the relatively short period from 1933 to 1937."[262] In one of these references counsel do mention the exception of the letter ruling of the Assistant Secretary written in 1926.[263]

This repeated emphasis of the "period from 1933 to 1937" gives a very misleading impression. As shown above, the Secretary and Department have made consistent rulings ever since the year 1900, starting, in that year, with the decision involving submerged lands in the Bering Sea; continuing with the Department's decision in 1910 of submerged lands off Key West, Florida, in the "open sea"; then with the Assistant Secretary's ruling in 1926 involving submerged lands in the Pacific Ocean off California; and then continuing with twenty-eight or so opinions of the Secretary and Department from 1933 to 1937. It should be stressed that the Secretary and Department have *never* issued a ruling adverse to the ownership by the State of California or any other coastal State.

---

[261] Plaintiff's Brief, pages 194, 195, 196, 197.
[262] Plaintiff's Brief, pages 194, 195, 196, 197.
[263] Plaintiff's Brief, page 194.

(c) Counsel's statement that "the Department has consistently maintained this position for the period from 1937"[264] implies that the Secretary has made rulings adverse to States' ownership of submerged lands. However, as said above, the Secretary and Department of the Interior have never issued any ruling inconsistent with the rulings above quoted that the State of California owns the marginal sea within its boundaries.[265]

(d) It is interesting to observe counsel arguing that one ground suggested in some of the rulings of the Department for denying these applications was that they were filed under the Mineral Leasing Act which applies only to "public lands"; that the term "public lands" has been held by this Court not to extend to "lands situated below high water mark"; and that, therefore, "there was room for the conclusion that the Department of the Interior had no jurisdiction" over these submerged lands.[265a] It is true that this suggestion is found in one or two of the decisions of the Secretary and Department rejecting these submerged land applications. We comment on counsel's position with respect to "public lands" in the Brief (pp. 93-94). We fail, however, to see that this suggestion, found in one or two of the decisions of the Secretary and Department, in any way alleviates the force of the other decisions squarely predicated upon the ground that title to the sub-

---

[264]Plaintiff's Brief, page 136.

[265]It is clearly stated in Plaintiff's Brief, page 194, that: "Since that period [1937], no action has been taken by the Department on applications of this type."

[265a]Plaintiff's Brief, p. 195.

merged lands in the Pacific Ocean is vested in the State of California.

(e) Counsel say that "it was plainly stated in some [of the rulings of the Secretary and Department] that 'it is for the Federal courts' to determine 'any question of title to such lands as between the State of California and the United States.' "[266] This is a misleading statement. When the first (*not the final*) ruling of the Secretary in the *Cunningham* case (55 I. D. 1, referred to above) is read, it is seen that the Secretary there first cited the leading cases in which this Court has declared the State to be the owner of the soil under all tide-waters within the State's limits, quoted this rule from *Weber v. Harbor Commissioners,* 18 Wall. 57, 65, and then said that:

> "It is clear that this Department has no jurisdiction. The State of California asserts title to tide and submerged lands under the common law as it has repeatedly been laid down by the Supreme Court of the United States. If any question of title to such lands as between the State of California and the United States is to be tried, it is for the Federal courts."[267]

This is an entirely different statement from the distorted paraphrasing thereof found in Plaintiff's Brief as above quoted. The Secretary did not say that it is for the Federal courts to determine the title question. The Secretary merely said, after announcing his view that California owned these lands, that if

[266] Plaintiff's Brief, p. 131, repeated at pages 195, 196.
[267] Appendix to Answer, pages 463, 469.

any question of title to such lands as between the State and the United States is to be tried, it is for the Federal courts.

(f) Counsel finally argue that the action of the Secretary and Department in making these many rulings

> "provide no basis for an estoppel or any similar doctrine,"

and cite the case of *United States v. San Francisco,* 310 U. S. 16, 31. This argument of estoppel completely misses the point. These rulings by the Secretary and Department are offered primarily in connection with the State's defense of acquiescence and long-continued recognition by the United States and its various branches and departments that the State is the owner of the submerged lands in question. These rulings by the Secretary and Department are to be taken with the mass of other evidence presented to the Court on this basic issue of acquiescence. This is not to be confused with the doctrine of estoppel.

The cited case of *United States v. San Francisco* merely states that

> "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to cause to be done what the law does not sanction or permit,"

citing *Utah Power & Light Company v. United States,* 243 U. S. 389, 409. However, in this instant proceeding it can hardly be argued that the Secretary of the Interior was not authorized by Congress to

pass upon applications for leases under the Mineral Leasing Act of February 25, 1920, as amended, and in so doing to reject applications upon the ground that the United States does not own title to the land covered by the application. Indeed, the Secretary or Department must, in the first instance, determine whether the particular lands described in an application for an oil and gas lease are public lands of the United States, and if that question is determined in the negative, there is no jurisdiction to proceed further with the application.[268] Obviously, then, Congress properly authorized the Secretary and Department to make these rulings.

(E) By the War and Navy Department.

We have discussed above instances of recognition by the War Department and Navy Department that title is vested in the respective coastal States to all submerged lands within State boundaries, including

(a) the War Department's report requesting warranty deeds conveying fee title to the United States to approximately 11 acres of submerged lands lying in the marginal sea outside the entrance of Newport Bay, California (*supra*, pp. 214, 218);

(b) the War Department's request for passage of the 1897 Act of the California Legislature, granting strips of submerged lands 300 yards wide around all

[268]30 U. S. C. A., Section 181, *et seq. United States ex rel. Roughton* (App. D. C.), 101 F. (2d) 248; *Dunn v. Ickes* (App. D. C. 1940), 115 F. (2d) 36. See *C. B. Reynolds, Jr.* (1937), 56 I. D. 60; *Joseph Cunningham* (1934), 55 I. D. (where after reviewing the title to the submerged lands and holding it to be vested in the State of California the Secretary said, "It is clear that this Department has no jurisdiction.") See *Margaret Scharf* (1941), 57 I. D. 348, 355.

military and defense reservations, which included three and probably four separate areas of hundreds of acres of submerged lands admittedly lying in the marginal sea of California outside of bays and harbors (supra, p. 174);[269]

(c) the Navy Department's report requesting an Act of the California Legislature passed in 1931 resulting in a deed from the State to the United States granting submerged lands in the open sea adjoining North Island, as well as tide and submerged lands located inside San Diego Bay (*supra,* p. 194);

(d) the dozen or more requests from the War and Navy Department resulting in grants, leases, easements and permits from the Cities of Los Angeles and Long Beach of submerged lands lying in the Pacific Ocean and Bay of San Pedro, extending over a period of three or four decades (*supra,* pp. 221-225; 232-248);

(e) the War Department instruction to its contractor resulting in grants of easements covering approximately three acres of submerged lands in the open sea off Santa Catalina Island (*supra,* pp. 203-206);

(f) the War Department's report and request resulting in the 1941 Act of the California Legislature and delivery by the State to the United States of an easement for the use of a 32-acre parcel of submerged lands lying in the marginal sea adjoining Silver Strand opposite the Coronado Beach Military Reservation (*supra,* p. 201);

---

[269]It should be particularly observed that the Judge Advocate General of the Army reviewed the War Department's proposal and request for these legislative grants from California resulting in the 1897 Act.

(g) the War Department's reports and requests resulting in grants from other coastal States to the United States of submerged lands lying in the marginal sea outside of bays and harbors, including the strip extending approximately two miles into the Gulf of Mexico outside Galveston Harbor (*supra,* p. 257), the two-mile strip of submerged lands extending into the Atlantic Ocean outside the mouth of St. John's River in Florida (*supra,* p. 265), and the strip of submerged lands extending two and one-half miles into the Gulf of Mexico outside the mouth of Crystal River in Florida (*supra,* p. 271).

The comments of counsel for plaintiff concerning the declarations and rulings of the War and Navy Departments that the coastal states own the submerged lands in and adjoining marginal seas are as follows:

(i) Counsel are content to say of the 17 maps filed by the War Department with the California Surveyor General pursuant to the California Act of March 9, 1897, granting the United States submerged lands 300 yards wide in front of reservations, that

"These maps were not filed pursuant to the Act of March 9, 1897, notwithstanding the misleading statements on some of the maps; they were filed under a wholly different statute of March 2, 1897 . . . which was an Act ceding exclusive *jurisdiction* over all lands held for military purposes and not an Act granting title."[270]

[270]Plaintiff's Brief, page 191.

Counsel err as we have shown above. The Act of March 2, 1897, specifically required, where political jurisdiction was ceded by the State over Federal reservations, that maps be filed by the United States with the *County Recorder*. But these 17 maps were filed under the March 9, 1897 Act (granting title) with the *California Surveyor General* and not with the County Recorder. Therefore, counsel's lame explanation of this filing of maps is completely wrong on the facts. But even if their facts were correct, it would not in any way detract from the circumstances that the idea of this 1897 Act originated in the War Department with the approval of the Chief of Engineers, passed upon by the Judge Advocate General of the Army, followed by a request of the California Legislature, resulting in enactment of the statute granting the submerged lands to the United States.

(ii) After their mention of the California Act of 1897, counsel then say that

> "With only two possible exceptions, none of the other actions of the War and Navy Departmens related to lands that may be classified as located clearly within the marginal sea,"

and then mention the North Island grant and the Silver Strand grant.[271] Apparently counsel would like to have us forget all about the numerous other grants which they concede were in the marginal sea and which originated with the War and Navy Departments, as shown above. But facts remain facts, no matter how counsel may seek to escape them.

---

[271] Plaintiff's Brief, pages 192-193.

BLANK
PAGE

BLANK
PAGE

APPENDIX H.

ESTOPPEL—LACHES—RES JUDICATA.

I.

Estoppel.

Plaintiff is estopped to claim title and ownership of the submerged lands in question.

The facts set out in the chapters under "Prescription" and "Aquiescence" demonstrate that representations have been made by the judicial, legislative and executive branches of the United States Government which have been relied upon by the State of California and its citizens in many transactions into which they have entered. These transactions include

(i) the grants of tide and submerged lands to the several coastal municipalities in Southern California, upon the faith of which harbors have been constructed and vast improvements have been made and titles have vested;

(ii) the creation and development of the entire kelp industry based upon the leasing statute of 1917; and

(iii) the off-shore petroleum industry developed under the 1921 legislation. Complete reliance has been placed particularly upon the principle of property law declared many times by the Court, as shown, by way of example, by the California Supreme Court upholding the validity of the 1921 off-shore petroleum legislation predicated squarely upon the prior decisions of the Court. These very declarations are the ones counsel for plaintiff now ask the Court to disregard or overrule.

Estoppel Runs Against the United States in Favor of a State.

It is established that as between two nations the doctrine of estoppel operates just as it does in litigation between two private individuals.

Lauterpacht, Private Law Sources and Analogies of International Law (1927), Secs. 87 and 88, develops this subject quite fully where it is stated in part that:

> "§87. *Estoppel and Preclusion. The Universal Application of the Doctrine of Estoppel.*
>
> "States are, in their mutual relations, subject to rules either expressly recognized by them, or flowing from the very nature of these relations and from the legal character of the international community . . . One *of them . . . is that of estoppel.*
>
> "It is not easy to adduce reasons why those general principles underlying estoppel should be disregarded in the relations between States. As a matter of fact, is not less than seven arbitration cases the doctrine of estoppel or preclusion [the terms used by Continental jurists] was put forward by the parties or made the basis of the award."

Lauterpacht, supra, then discusses seven cases between nations in which the doctrine of estoppel was put forward by the parties or was made the basis of the award.[1]

---

[1] *Lauterpacht, "Private Law Sources and Analogies of International Law"* (1927), pp. 224, 232, 248, 253-255, 259, 268-269, 280.

V *Hackworth, Digest of International Law* (1940), pp. 495-496.

See also *McNair, "The Legality of the Occupation of the Ruhr"* (1924), The British Book of International Law, pp. 17, 34-36.

The opinions of the Court and of the lower Federal courts have recognized that there are exceptions to the general rule that the doctrine of estoppel does not operate against the United States.[2]

---

[2]For example, the Sixth Circuit Court of Appeals said in *United States v. Pennsylvania and Lake Erie Dock Co.* (1921), 272 Fed. 839, 848, in commenting upon the decision of the Court in *United States v. Stinson,* 197 U. S. 200, 204, that:

> "In the case of United States v. Stinson, 197 U. S. 200-204, 25 Sup. Ct. 426, 49 L. Ed. 724, the Supreme Court held that, while laches or limitations do not of themselves constitute a distinct defense as against an action by the United States to assert a right in property, nevertheless it affirmed the judgment of the lower court in that case, which judgment was based upon the declaration that 'the substantial consideration underlying the doctrine of estoppel applies to the government as well as to individuals.' "

The Eighth Circuit Court of Appeals said in *Utah Power & Light Co. v. United States* (1915), 230 Fed. 328, 342:

> ". . . there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents . . . the government will be estopped."

United States v. Chandler-Dunbar Water Power Co. (C. C. A. 6, 1907), 152 Fed. 25, affd. 209 U. S. 447, the Circuit Court of Appeals, in holding the government estopped, said (at page 40) that:

> "But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties."

United States v. Denver & R. G. W. R. Co. (C. C. A. 8, 1926), 16 F. (2d) 374, holding the government estopped by action of the Secretary of the Interior, the court said:

> ". . . the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim."

See also *State of Iowa v. Carr* (C. C. A. 8, 1911), 191 Fed. 257, 266, 267, 269.

Standard Oil Company of California v. United States (C. C. A. 9, 1939), 107 F. (2d) 402, 416 (cited in Plaintiff's Brief, page 208), recognized that estoppel may bar the United States, though finding the facts insufficient in that case, where the court said:

> "We think no sufficient case of laches or estoppel has been made out."

The same grounds are present for recognizing exceptions to the rule denying an estoppel against the United States, depending upon the nature of the suitor, as were recently found to be present in making exceptions to the rule of *nullum tempus* running against the Government, where this Court said:

> "As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy *generated by the nature of the suitor or of the claim which it asserts.* That this is the guiding principle sufficiently appears in the many instances in which *courts have narrowly restricted the application of the rule nullum tempus* in the case of the domestic sovereign."[3]

When the United States comes into a court of equity and asserts ownership as against one of the States in the Union (in this case, in effect, against twenty-one coastal States), the nature of the suitor asserting the estoppel affords full reason for estopping the United States where the circumstances would warrant an estoppel between private litigants.

2. Counsel's Argument That the Representations Were Unauthorized Is Unsound.

As we have seen, counsel relies[4] in the main upon decisions of this Court to the effect that acts and conduct of officers or agents of the Government which are *unauthor-*

---

[3]*Guaranty Trust Company v. United States* (1938), 304 U. S. 126, 134-135.

[4]Plaintiff's Brief, pages 204-214.

ized cannot constitute the foundation for an estoppel against it.[5] The other cases cited by counsel on the sub-

---

[5]*Utah Power & Light Co. v. United States* (1916), 243 U. S. 389 (where the Court said (page 409) that:

". . . It is enough to say that the United States is neither bound nor estopped by the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.")

United States v. San Francisco (1939), 310 U. S. 16, 31, 32 (the Court merely repeated the above quotation from *Utah Power & Light Co. v. U. S.*);

Utah v. United States (1931), 284 U. S. 534, 545-546 (the Court, referring to the Special United States Assistant Attorney General, said: "In any case, he was obviously *without authority* to dispose of the rights of the United States.").

Lee Wilson & Co. v. United States (1917), 245 U. S. 24, 31 (fraud or mistake of Land Department survey in assuming existence of a lake does not preclude Land Department from dealing with area on discovery of fraud or mistake);

Jeems Bayou Club v. United States (1922), 260 U. S. 561, 564 (correspondence with Commissioner of General Land Office and Director of Geographical Survey that no unsurveyed lands existed in the locality held not to estop the United States, the Court citing *Utah Power & Light Co. v. United States, supra,* the citation making it obvious that the Court treated these as *unauthorized* statements);

Pine River Lodging Co. v. United States (1901), 186 U. S. 279, 291 ("*no authority* had been given to" the officers making the statements);

Cramer v. United States (1922), 261 U. S. 219, 234 ("no officer or agent of the government had *authority* to deal with land upon any other theory");

United States v. Standard Oil Co. of California (D. C. Cal., 1937), 20 F. Supp. 427, 452-454, affirmed (C. C. A. 9, 1939), 107 F. (2d) 402, 416, cert. denied 309 U. S. 673 ("The doctrine of estoppel may be affirmed successfully against [the Government] when it or its agents, acting within the scope of their *authority,* have been guilty of acts which amount to fraud and which were acted on in good faith by others to their detriment.");

United States v. Fitzgerald (1841), 15 Peters 407, 421 (Decision *against* United States upholding private party's preemption title, the Court, holding no appropriation of the land for public use, saying: "As no such *authority* has been shown to authorize the collector . . .");

Royal Indemnity Co. v. United States (1941), 313 U. S. 289, 294 (Holding revenue collector without *authority* to release govern-

ject are suits announcing well recognized rules in the law of estoppel which no one desires to dispute.[6] Thus,

---

ment's interest claim against taxpayer unless specifically authorized by Congress);

Whiteside v. United States (1876), 93 U. S. 247, 253, 256 ("It was made by the assistant special agent, who had *no authority* to make it.");

Sioux Tribe v. United States (1942), 316 U. S. 317 (Without an act of Congress the President is *unauthorized* to convey Indian lands by executive order excluding lands from the public domain; the Court holding that therefore the executive orders did not convey to the Indians a compensable interest in the lands but only a use of the lands until terminated at the will of either the Executive or Congress without obligation to compensate the Indian tribe therefor.);

Wilber National Bank v. United States (1934), 294 U. S. 120, 123 (merely repeats the quotation from *Utah Power & Light Co. v. United States, supra*).

[6]*Brant v. Virginia Coal & Iron Co.* (1876), 93 U. S. 326, 337 (a suit between private litigants in which the Court applied the rule that "where the condition of the title is known to both parties where both have the same means to ascertain the truth, there can be no estoppel");

Oklahoma v. Texas (1925), 268 U. S. 252, 257-258 (dispute between two private patentees, one claiming estoppel by reason of a survey assertedly showing a vacant strip of land along Red River bank, but where findings of the master were that the person asserting the estoppel had his attorney examine the title prior to purchase, and the Court stated the rule that: "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.");

Ashwander v. T. V. A. (1936), 297 U. S. 288, 323 (a proceeding before the State Utilities Commission and a delay in filing this suit was held not to cause prejudice to the power company and hence no basis for the claim of estoppel, the court saying: "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities.");

Ketchum v. Duncan (1878), 96 U. S. 659, 666 (holding that none of plaintiff bondholders nor any other bondholder was misled, the court stating in this connection that: "It [estoppel in pais] operates only in favor of a person who has been misled to his injury, and he only can set it up.");

Jones v. United States (1878), 96 U. S. 24, 29 (In holding that the United States did nothing to warrant the contractor in changing his position, the Court said that estoppel was inapplicable).

counsel seeks to have this Court apply the "unauthorized agent" rule to nullify the facts establishing an estoppel in favor of the State and against the United States.

But there is nothing *unauthorized* in the policy of Congress, the declarations of this Court, the rulings of the Secretary and Department of the Interior and the other Departments, which are the foundation of the estoppel in this case.

Certainly, Congress was authorized to establish the policy which it has adopted and followed for many decades recognizing and declaring State ownership of all submerged lands within State boundaries.

Certainly, this Court has full authority under the Constitution to declare a general principle of property law as it has done for the last 105 years with respect to submerged lands.

Certainly, also, the Secretary and Department of the Interior had full authority under acts of Congress to determine in the first instance whether lands described in an application for an oil and gas lease, mining claim or other interest, were or were not public lands of the United States.

So, also, with respect to the War and Navy Departments.

Thus, the facts of this case render counsel's citation of the "unauthorized agent" decisions meaningless.

3. Counsel's Argument That There Has Been No Reliance by the State Is Groundless.

Counsel's argument that the State has not placed any reliance upon the policy of Congress, the declarations of this Court, and the rulings of the various Departments that the States own all submerged lands within their borders, is not worthy of serious consideration.

A review of the proceedings in *Boone v. Kingsbury,* 206 Cal. 148 (certiorari denied and appeal dismissed in this Court, 280 U. S. 517), amply proves the reliance placed by the State, its officers and citizens upon the declarations of the Court that the State is the owner of the beds of all navigable waters within its boundaries. The basic foundation of the decision of the California court in *Boone v. Kingsbury,* in upholding the 1921 offshore leasing legislation, is the rule of property declared by the Court that the State is the owner of all submerged lands. Consequent upon the determination of the proceedings in *Boone v. Kingsbury,* a complete industry was developed based upon the 1921 leasing legislation whereby the State has regulated the development of offshore petroleum deposits. Vast sums have been expended by the State's lessees in the development of this industry. This is only one of a number of examples.

Counsel's argument that the State itself has benefited rather than suffered a detriment through the development of this offshore petroleum industry, "whatever may have been the fortunes of the lessees themselves",[7] is an absurd

[7]Plaintiff's Brief, page 202.

contention. Counsel seek to enjoin these very same lessees by a decree in this proceeding while at the same time they ask the Court to overlook the reliance of these lessees who acted under contract with the State. The true principle is that the State represents its citizens, and those under contract with it, in defending this proceeding whereby plaintiff seeks an adjudication of title binding, not only upon the State, but upon those acting under contract or lease with the State.

It is obvious that the various municipal grantees from the State of submerged lands within municipal boundaries placed absolute faith and reliance upon the declarations of the Court and the policy of Congress that the State owns all submerged lands within its boundary. Public bond issues raising millions of dollars for the creation and development of the Outer Harbors at Long Beach, Los Angeles, Santa Monica, Santa Barbara and elsewhere have obviously been predicated upon the faith in the declarations of this rule of property by the Court and the Congressional policy adhering to it, and the adherence thereto of all other Departments, until quite recently.

These are the facts which compel an application of the doctrine of estoppel, the barring of plaintiff at this late date from seeking a reversal of the established rule of property.

II.

LACHES.

Contrary to plaintiff's contentions,[8] it is plain that after this long lapse of time during which Congress has maintained its policy of recognizing and declaring States' ownership of submerged lands, and the reliance upon that doctrine placed by the citizens of California and the other coastal States, plaintiff is thereby barred of any right at this late date to maintain a contrary position.

Counsel for plaintiff assert that:

> "In any event the defense of laches is not available as against the United States,"

and cite several decisions of this Court as supporting the assertion.[9] However, we have found that these authorities cited by plaintiff[10] involve suits between private litigants and the United States, except for the cited case

---

[8]Plaintiff's Brief, pages 214-218.

[9]Plaintiff's Brief, page 215.

[10]The cases cited by plaintiff in support of this assertion are the following:

Utah Power & Light Co. v. United States (1916), 243 U. S. 389—discussed in Footnote 5, *supra*;

Guaranty Trust Co. v. United States (1938), 304 U. S. 126, 132-133—discussed *supra*, Footnote 3, and also in the chapter on Prescription, pp. 145, 146, notes 62, 63;

United States v. Insley (1889), 130 U. S. 263, 266 (a suit by the United States against a private litigant to redeem a parcel of land);

United States v. Kirkpatrick (1824), 9 Wheat. 720, 735 (action of debt to enforce a bond given by defendant to the United States for faithful discharge of duties of the office of tax collector);

United States v. Summerlin (1940), 310 U. S. 414, 416 (suit by the United States to enforce a claim against the estate of a private individual).

of *United States v. Michigan,* 190 U. S. 379, 405, of which case counsel say

> "this Court has held this to be the rule in an original suit brought by the United States against a State."[11]

However, in the *Michigan case,* the action was brought against the State

> "as trustee, and its liability to pay over the surplus moneys (if any), which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all costs of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12."[12]

Thus, the *Michigan case* was simply one to recover moneys collected by the State as trustee for the United States under a statutory arrangement between the United States and the State for the construction of a canal in the St. Mary's River, connecting Lakes Huron and Superior by means of sale of public lands of the United States to furnish funds for that purpose. It was in connection with this suit to recover these moneys held by the State as trustee that the Court asserted that:

> "The defense that might arise therefrom is not available *ordinarily* against the Government."

---

[11] Plaintiff's Brief, pages 215-216.
[12] 190 U. S. at page 405.

It is apparent from the addition of the qualifying word—"ordinarily"—that the Court recognized in special circumstances laches may debar the United States.

Such is the holding in the cases where special circumstances are present. The courts have held the United States may be debarred by lapse of time where special circumstances require.[18]

If there ever was a case where special circumstances called for barring the United States from seeking to overcome an established rule of law and from undermining the stability of titles to real property, where decades have elapsed without action, this is such a case.

---

[18]*United States v. McElroy* (C. C. Kan., 1885), 25 Fed. 804 (". . . the ordinary rules controlling courts of equity as to the effect of laches should be enforced.");

The No. 34 Case (D. C. Mass., 1925), 11 F. (2d) 287, later opinion 13 F. (2d) 927 (United States barred of relief under the doctrine of laches);

United States v. Wallamet, etc. Co. (C. C. Ore., 1890), 44 Fed. 234, 240-241;

(Continued next page)

III.
RES JUDICATA.

After its admission into the Union in 1850, the State of California granted a portion of the submerged lands under the navigable waters of the Bay of San Francisco to one Tichenor, whose interest was later transferred and became vested in Mission Rock Campany. This grantee and his successor reclaimed the lands from the waters of the San Francisco Bay and made it upland adjacent to certain small rocks known as "Mission Rock."

Thereafter, the United States, acting through the President, the Secretary of the Navy, and the Attorney General, made claim for naval purposes to the reclaimed submerged lands so granted to Tichenor. The United States brought suit in the United States District Court to eject Mission Rock Company from these submerged lands. The suit was appealed to this Court, which finally adjudicated the rights of the parties and determined (1) that the United States had no interest or estate in and to the lands reclaimed from beneath the navigable waters of San Francisco Bay; (2) that the United States had no interest or estate in the submerged lands within the State of Cali-

---

(Note 13—Continued):

United States v. Beebee (C. C. Ark., 1883), 17 Fed. 36, 40 (". . . lapse of time may constitute a sufficient defense") affirmed in *United States v. Beebee* (1887), 127 U. S. 338, 347-348 ("More than 45 years ago, the complainants in this bill could have instituted their action . . . constitute reasons more than sufficient for the refusal of the court to set aside such patent at the suit of a party who has so long slept upon his alleged rights");

United States v. Stinson (C. C. A. 7, 1903), 125 Fed. 907, 909-910, affirmed *United States v. Stinson* (1904), 197 U. S. 200;

Shooters Island S. Co. v. Standard Shipbuilding Corporation (C. C. A. 3, 1923), 293 Fed. 706, 715.

fornia; (3) that the State upon its admission into the Union became vested with

> "the absolute property in . . . all soil under the tide waters within her limits";

and (4) that Mission Rock Company owned said reclaimed submerged lands by virtue of the grant made by the State of California to Tichenor. The opinion of this Court in that case was reported in *United States v. Mission Rock Company*, 189 U. S. 391.

All tide and submerged lands underlying all nagivable waters within the boundaries of the State of California passed to it as a unit and by virtue of the same recognition and confirmation of its sovereignty in and to all such tide and submerged lands. By reason of the unity and common and single basis of title of all tide and submerged lands held by the State prior to and after September 9, 1850, the question of title in and to all such lands located within the boundaries of the State by virtue of the adjudication in the case of *United States v. Mission Rock Company, supra*, became and is *res judicata* between the United States on the one hand and the State of California, its grantees, lessees and successors, on the other hand.

BLANK
PAGE

BLANK
PAGE

APPENDIX I.

Serial No. 22

DEPARTMENT OF COMMERCE

U. S. COAST AND GEODETIC SURVEY

E. LESTER JONES, Superintendent

LENGTHS, IN STATUTE MILES, OF THE GENERAL COAST LINE AND TIDAL SHORE LINE OF THE UNITED STATES AND OUTLYING TERRITORIES.

November, 1915.

COAST LINE OF THE UNITED STATES AND OUTLYING TERRITORIES.

This table of lengths of coast line and tidal shore line is issued to meet a constant demand for this class of information.

It should be understood that unless the scale of the maps used and the method of measurements are given, a numerical statement of the length of the shore line conveys no definite meaning, as measurements will differ so widely as to afford no common basis of comparison, and every measurement will give a different result.

On existing maps the shore line may be measured in various ways, viz:

1. In steps of different lengths with the dividers following the shore as represented. The shorter the steps the greater will be the resulting length.

2. With an opisometer following all the indentations shown on the map.

3. Straight lines may be measured joining the principal headlands, which will give the shortest distances between these points.

In any case the scale of the map would be an important factor, as the larger scale shows more detail than the smaller.

It must be decided whether or not to include the shore line of bays, sounds, navigable rivers, lakes, and islands.

The details of the method of making the measurements in steps of different lengths with the dividers (unit measure) are as follows:

General coast line.—The figures under this heading give the length in statute miles of the general outline of the sea coast. The measurements were made with a unit measure of 30 minutes of latitude on charts as near the scale of 1/1,200,000 as possible. The shore line of bays, sounds, and other bodies of water whose entrance width is greater than the unit measure is included to a point where such waters narrow to the width of the unit measure, and the distance across at such point is included. Where the entrance width of such waters is less than the unit measure, the distance across is included, but the shore line inside is not.

Tidal shore line, unit measure 3 statute miles.—The figures under this heading give the length in statute miles of the shore line on tidal waters to points where such waters narrow to a width of 3 statute miles. The figures for Louisiana do not include the shore line of Lakes Maurepas and Pontchartrain, and the delta of the Mississippi River was measured as mainland. The measurements were made on charts of 1/200,000 and 1/400,000 scale when available.

Tidal shore line, unit measure 1 statute mile.—The figures under this heading give the length in statute miles of the shore line on tidal waters to points where such waters narrow to a width of *one* statute mile, and include the shore line of those bodies of tidal waters more than 1 mile wide which lie close to the main waters, even though the entrance width is less than the unit measure. The measurements were made on charts of 1/80,000 scale for the Atlantic and Gulf coasts, on charts of 1/200,000 scale for the Pacific coast, and on charts as near those scales as available for the other regions.

The island shore line of South Carolina and Georgia includes only those islands shown on the Coast Survey charts by well-defined channels and bayous.

The shore line of Louisiana includes that of Lakes Maurepas and Pontchartrain.

The mainland shore line of the Mississippi Delta and the salt marshes to the westward were measured along a line drawn to include the main portions of the land masses. The island shore line includes only those islands outside the same line.

Alaska, the Philippine Islands, and United States Samoan Islands were not measured with a unit measure of 1 statute mile, as large areas are unsurveyed, and such a measurement would be very approximate, if not misleading.

The Panama Canal Zone.—Islands outside the 3 nautical mile zone were not included.

Lengths, in statute miles, of the general coast line and tidal shore line of the United States and outlying territories.

Locality.	General coast line, unit measure 30 minutes latitude.	Tidal shore line, unit measure 3 statute miles.			Tidal shore line, unit measure 1 statute mile.		
		Mainland.	Islands.	Total.	Mainland.	Islands.	Total.
Maine	228	339	337	676	558	761	1,319
New Hampshire	13	14	.....	14	15	5	20
Massachusetts	192	295	158	453	421	250	671
Rhode Island	40	72	84	156	118	100	218
Connecticut	.....	96	.....	96	126	18	144
New York	127	30	440	470	31	798	829

Lengths, in statute miles, of the general coast line and tidal shore line of the United States and outlying territories—Continued.

Locality.	General coast line, unit measure 30 minutes latitude.	Tidal shore line, unit measure 3 statute miles.			Tidal shore line, unit measure 1 statute mile.		
		Mainland.	Islands.	Total.	Mainland.	Islands.	Total.
New Jersey	130	242	156	398	392	368	760
Pennsylvania	.....	.....	.....	.....	13	.....	13
Delaware	28	79	.....	79	140	14	154
Maryland	81	322	130	452	770	275	1,045
Virginia	112	342	225	567	780	500	1,280
North Carolina	301	570	460	1,030	1,040	831	1,871
South Carolina	187	230	528	758	281	960	1,241
Georgia	100	110	493	603	166	727	893
Florida:							
Atlantic	399	411	207	618	714	507	1,221
Gulf	798	866	792	1,658	1,273	1,257	2,530
Total	1,197	1,277	999	2,276	1,987	1,764	3,751
Alabama	53	131	68	199	174	117	291
Mississippi	71	76	79	155	99	103	202
Louisiana	397	725	260	985	1,122	591	1,713
Texas	367	624	476	1,100	973	709	1,682
California	913	949	241	1,190	1,264	291	1,555
Oregon	296	312	.....	312	429	60	489
Washington	157	479	429	908	1,037	684	1,721
United States:							
Atlantic coast	1,888	3,152	3,218	6,370	5,565	6,114	11,679
Gulf coast	1,629	2,422	1,675	4,097	3,641	2,777	6,418
Pacific coast	1,366	1,740	670	2,410	2,730	1,035	3,765
Total	4,883	7,314	5,563	12,877	11,936	9,926	21,862
Alaska	6,640	6,542	8,590	15,132	.....	.....	.....
Philippine Islands	4,170	.....	.....	10,850	.....	.....	.....
Porto Rico	311	.....	.....	362	.....	.....	412
Guam	78	.....	.....	84	85	7	92
Hawaiian Islands	775	.....	.....	810	.....	.....	842
Panama Canal Zone	20	.....	.....	.....	29	4	33
United States Samoan Islands	76	.....	.....	91	.....	.....	.....

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

For sale by the Superintendent of Documents, Washington, D. C. - - - - - - - - - - Price 5 cents